

An Evaluation of the Rights of Fixed Term Employees in South Africa

by

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Declaration of Authenticity

I declare that '**An Evaluation of the Rights of Fixed Term Employees in South Africa**' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

JUDITH GELDENHUYS

Acknowledgments

I dedicate this thesis to Jesus Christ - my Jehovah-Jireh - who has always provided for me and has been and will always continue to be the author of and lead role in every chapter of my life. He has proven again, like so many times before, that through Him all things are possible. I am so grateful for finally being allowed and able to close this door. He is deserving of all praise and honour.

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Abstract

The current South African legislative framework does not properly address the unequal bargaining position between employers and fixed term employees. Ineffective regulation of fixed term employment in South Africa has had the effect of excluding certain groups of fixed term employees from claiming the remedies provided in terms of the Labour Relations Act and other labour legislation. Furthermore, where remedies are applicable to them they are often ineffectual.

Interpretational variation evident from case law pertaining to the enforcement of the rights of fixed term employees, indicate clear lacunae in the unfair dismissal protection afforded to these vulnerable employees. This is mainly a consequence of uncertainties related to the interpretation of the legislative provisions.

The infusion of the values entrenched in the Constitution of the Republic of South Africa and the development of the common law to reflect these values might augment the scope and availability of rights enjoyed by fixed term employees. But, changing socio-economic and political circumstances necessitates review and amendment of the legislation applicable to fixed term employees to meet the country's constitutional and international obligations.

Proposed amendments to the Labour Relations Act have been tabled. These amendments may be capable of addressing some of the current problems. However, they may also lead to other undesirable consequences. An investigation into problems related to the application of similar provisions as those proposed by the Labour Relations Amendment Bill in other jurisdictions crystallises some possible causes for concern. Some of the proposed changes could create new vulnerabilities, or renew old ones.

Key terms

Atypical employees – Fixed term contracts – Fixed term employees – Security of employment – Dismissal protection - Reasonable expectation – Development of the common law – Interpretation of labour legislation – Constitutional alignment – Labour Relations Amendment Bill

Table of Contents

Setting the scene	1
1 Defining 'fixed term employee'	2
2 The prevalence and nature of fixed term employment in South Africa	3
3 Unemployment and informalisation	7
4 Research aims and synopsis	12
CHAPTER 1 The statutory rights of fixed term employees	17
Introduction.....	17
1.1 Qualifications for eligibility to rights in labour legislation	18
1.2 The right to fair labour practices.....	25
1.2.1 Unfair labour practice protection in terms of the LRA.....	29
1.2.2 Protection against unfair dismissal.....	31
1.2.3 The right to freedom of association	33
1.2.4 Basic employment conditions.....	35
1.2.5 The right to refer a dispute for resolution	39
1.2.6 The right to social security	41
1.2.6.1 The right to safe and healthy working conditions	42
1.2.6.2 Unemployment Insurance	46
1.2.6.3 Social security	48
1.3 The right to equal treatment	49
1.3.1 The constitutional right to equality.....	50
1.3.2 The EEA.....	54
1.3.3 The PEPUDA.....	60
1.3.4 The LRA.....	63
1.4 The right to dignity	64
1.5 The right to basic education.....	65
1.6 The right to access to information	67
1.7 The right to fair administrative procedure.....	68
1.8 Limitation of constitutional rights	69
Concluding remarks	70
CHAPTER 2 Contractual rights of fixed term employees	75
Introduction.....	75
2.1 Automatic termination of fixed term contracts	77
2.2 Mutual trust and confidence.....	78
2.3 Implied terms	80
2.4 Tacit renewal of fixed term contracts	85
2.5 Legitimate or 'reasonable expectation'	87
2.6 The doctrine of estoppel.....	91
2.7 Express contractual terms enjoy preference.....	96

2.8 The effect of legislative protection against unfair dismissal on contractual protection	101
2.9 Access to contractual remedies	105
2.10 Development to align the common law with the Constitution	109
Concluding remarks.....	111
CHAPTER 3 The substance and practicality of the statutory rights of fixed term employees	113
Introduction.....	113
3.1 Practical difficulties in the enforcement of fair labour practices in terms of the LRA	114
3.1.1 Unfair labour practice: promotion	115
3.1.2 Unfair labour practice: Benefits.....	122
3.1.3 Unfair labour practice: demotion.....	126
3.2 The weaknesses of s 186(1)(b) of the LRA	127
3.2.1 The onus of proof	128
3.2.2 The cause for an automatically unfair dismissal must be the proximate or only reason	133
3.2.3 Factors considered in establishing whether or not a reasonable expectation was created.....	135
3.2.3.1 Express terms barring the possibility of a reasonable expectation	136
3.2.3.2 Public policy.....	137
3.2.3.3 Express term providing for renegotiation of contractual terms	142
3.2.3.4 The reasons for appointing employees on fixed term contracts	143
3.2.3.5 Conditions that were set for renewal have been complied with	144
3.2.3.6 The availability of funds and reasonable expectation.....	145
3.2.3.7 Breakdown of the employment relationship.....	147
3.2.3.8.....Retirement age and reasonable expectation.....	149
3.2.3.9.....Transfer of fixed term employees	150
3.2.3.10... The fixed term employee not claiming unemployment insurance.....	151
3.2.3.11 A client no longer requires the service of a fixed term employee	151
3.2.3.12 Affirmative action and reasonable expectation.....	153
3.2.3.13 Inherent requirement and reasonable expectation.....	156
3.3 The nature of the expectation	156
3.4 Defences arising from the wording of s 186(1)(b) of the LRA.....	158
3.4.1 An offer to renew a fixed term contract	159
3.4.2 Substantive and procedural fairness	162
3.4.2.1 Reasons related to the fixed term employee's conduct	162
3.4.2.2 Reasons related to the fixed term employee's incapacity.....	164
3.4.2.3 Fair operational reasons	164
3.5 Remedies for unfair dismissal in terms of the LRA.....	166
3.5.1 Re-instatement or re-appointment.....	166
3.5.2 Compensation	169
3.5.2.1 Severance payment as part of compensation for unfair dismissal.....	174
Concluding Remarks.....	175
CHAPTER 4 Weaknesses in the dispute resolution system	179
Introduction.....	179

4.1 Establishing jurisdiction	179
4.1.1 Referral of the dismissal dispute must not be premature.....	180
4.1.2 The ‘employee’ must have been appointed in terms of a ‘fixed term contract’	182
4.2 The labour dispute resolution institutions.....	187
4.2.1 Concurrent jurisdiction of the labour courts and civil courts.....	189
4.3 Legal technicality	195
4.3.1 The Code of Good Practice: Dismissal.....	196
4.3.2 Too many review applications and appeals	198
4.3.3 Labour disputes take very long to resolve.....	201
4.4 Costs of litigation	203
Concluding remarks	206
CHAPTER 5 The correct approach to interpretation of s 186(1)(b) of the LRA.....	207
Introduction.....	207
5.1 Interpretation of the LRA	207
5.2 Interpretation of s 186(1)(b) of the LRA.....	212
5.2.1 A narrow, literal approach to interpretation	213
5.2.1.1...Dierks v University of South Africa	214
5.2.1.2...SA Rugby (Pty) Ltd v CCMA & others.....	217
5.2.2 A purposive construct	218
5.2.2.1 University of Cape Town v Auf der Heyde	218
5.2.2.2 McInnes v Technikon Natal	219
5.2.2.3 Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood.	219
5.2.2.4 Geldenhuys and University of Pretoria	220
5.2.2.5. University of Pretoria v CCMA & others	221
5.3 University of Pretoria v CCMA & others	222
5.4 The doctrine of precedent	226
5.5 The need for statutory intervention	227
Concluding remarks	228
CHAPTER 6 Amendments affecting fixed term employees	229
Introduction.....	229
6.1 International obligations.....	230
6.1.1 Freedom of association and protection of the right to organise	231
6.1.2 Equal pay for work of equal value.....	232
6.1.3 Elimination of discrimination.....	233
6.1.4 Protection of job security.....	234
6.2 The Labour Relations Amendment Bill 2012	235
6.2.1 Fixed term employees and union representativity.....	237
6.2.2 Dismissal provision will include fixed term employees who expect indefinite employment	239
6.2.2.1. Preservation of employment	242
6.2.2.2 Unlimited compensation and/ or basic compensation awards.....	244
6.2.2.3 Fixed term contract defined	245
6.2.3 Equal treatment of fixed term employees after six months.....	248

6.2.4	Restriction of the use of temporary employment services	249
6.2.4.1	Labour brokerage: International practice	251
6.2.5	Equal treatment for part-time employees	252
6.2.6	Severance pay will become payable to certain fixed term employees	254
6.2.6.1	Severance pay payable to fixed term employees in other jurisdictions.....	256
6.2.7	Restriction and conditions for review applications	256
6.2.7.1	Time limits set for review applications.....	257
6.2.7.2	Employers will have to pay in security	257
6.2.7.3	Reviews of points <i>in limine</i> will be made exceptional.....	258
6.2.8	The scope of the statutory presumption of who qualifies as an ‘employee’ will be extended	259
6.3	Problems in proving that work is ‘comparable’ to a permanent employee’s work	260
6.4	Dismissal protection will be made subject to qualification	263
6.4.1	Qualifying period for dismissal protection	265
6.4.2	Exclusion of fixed term employees from the dismissal protection in other jurisdictions	265
6.5	Potential effects of the proposed legislation.....	268
6.5.1	A possible decrease in new appointments or retrenchments.....	268
6.5.2	Evasion of legislation.....	269
6.5.3	Increased cost to business and more onerous administrative burden for employers	269
6.5.4	Degradation of the benefits received by permanent employees	270
6.5.5	More job security for fixed term employees	271
6.5.6	Arbitrary exclusion from dismissal protection	272
6.5.7	Avoiding an imminent poverty trap	273
6.5.8	The labour system would become less flexible.....	274
6.5.9	A new regulatory impact assessment should be performed	278
6.6	Practical aspects	279
6.6.1	Means testing to establish eligibility	281
6.6.2	Part-time or fixed term protection.....	282
6.6.3	Proving continuity in employment.....	286
6.6.4	Employers will have to provide objective reasons for a fixed term appointment or renewal	289
6.6.4.1	A shift in the evidentiary burden	291
6.6.4.2	Reason for the conclusion of a fixed term contract in other jurisdictions	292
6.6.4.3	Provision of reasons for dismissal	296
6.6.5	Maximum duration of fixed term appointments in other jurisdictions	297
6.6.6	Equal treatment of fixed term employees in other jurisdictions	302
	Concluding Remarks.....	303
7	Conclusion	307
7.1	Recommendations.....	324
8	Bibliography	329

List of abbreviations

BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
EAT	Employment Appeal Tribunal
EEA	Employment Equity Act
GG	Government Gazette
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
OHSA	Occupational Health and Safety Act
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
RIA	Regulatory Impact Assessment
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
TES	Temporary Employment Service
UIA	Unemployment Insurance Act
UK	United Kingdom
US	United States

Setting the scene

Introduction

Labour law recognises that employers are generally in a stronger bargaining position than employees.¹ Therefore, labour law is largely premised on the philosophy of protection of the interest of employees. Fixed term employees² as ‘atypical’³ or ‘contingent’ employees are particularly weak bargaining parties in the employment relationship. It is common practice for employers to treat fixed term fixed term employees differently to their permanent colleagues. Temporary employment relationships are often associated with the withholding of rights and benefits, lack of job security, deprivation of status and poor remuneration. Fixed term employees are also often more exposed to exploitation particularly those who are not highly skilled.⁴ In addition they often do not enjoy trade union protection and are not covered by collective agreements. Therefore, fixed term employees are more inclined to depend on statutory protection enacted to ensure basic working conditions. Although they may enjoy equal legislative protection in theory, in practice the circumstances of their work make it very difficult to enforce their rights.⁵

¹ In Davies PL & Freedland MR *Kahn-Freund's Labour and the Law* 3rd edn (London Stevens 1983) at 18 the position is aptly expressed as follows: ‘The main object of labour law has always been, and we venture to say, will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.’ In *Mahmud and Malik v BCCI* [1997] ICR 606 at 613E the inequity in bargaining power is recognised. See also *NEWU v CCMA & others* (2003) 24 ILJ 2335 (LC) at para 20.

² In this thesis, the term ‘fixed term employee’ is used to describe a person appointed in terms of the fixed term contract. A fixed term contract means a contract which is concluded for a fixed time period or until the occurrence of a specific event. This accords with the definition for ‘fixed term work’ as ‘working relationships in which individuals are hired under contracts specified to subsist for a fixed period of time’ as used in McCann D *Regulating Flexible Work* (Oxford University Press 2008) at 102.

³ Atypical employees are defined by what they are not: They are often not full-time, they do not necessarily work for or on the premises of one employer and they do not work for an undetermined period. Theron Jan ‘Employment is Not What It Used to be’ (2003) 24 *Industrial Law Journal* 1247 at 1249.

⁴ Notably some fixed term appointments may require very developed skills. It is for instance common to appoint rectors of universities on fixed term contracts of employment. See also the discussion under 2 below.

⁵ Gericke SB ‘A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment’ *PER/PELJ* 2011 (14) 1 at 3. See also the statement made by the Department of Labour in the ‘Green Paper on Labour: Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute’ of 13 February 1996 accessed at <http://www.info.gov.za/greenpapers/1996/labour.htm#Executive> (23 March 2013).

The significance of this research is to expand on the field of knowledge pertaining to the rights of fixed term employees by pointing out both substantive and procedural flaws and problems in the enforcement of common law and statutory rights. By drawing from the experience of other jurisdictions, possible additional or recurrent problems if the proposed new laws affecting fixed term employees are implemented, are identified. In addition, areas for further development of scholarship are identified and proposals are put forward to address the predicted shortcomings.

1 Defining ‘fixed term employee’

Although the term ‘fixed term employee’ is undefined in South African labour legislation⁶ it is trite that employees appointed under fixed term contracts form a distinct group of atypical employee. An ‘atypical employee’ is not a standard employee. The traditional model of employment in South Africa is full-time life-long employment with one employer.⁷ ‘Atypical’ is used to describe a deviation from the norm.⁸ Atypical work may either involve ‘direct’ employees and ‘indirect’ employees where more than one employer or client is involved.⁹ Employees working for temporary employment services also fall within the definition of ‘fixed term employee’ as used herein.

A fixed term contract of employment is concluded if two people agree that one (the employee) will make his or her services available and be subordinate to the other (the employer) for a fixed period of time for remuneration.¹⁰ The very title ‘fixed term

⁶ The only definition that is even remotely related is the one provided for in item 11.3.6 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures in GG No. 27866 (4 August 2005) which defines ‘fixed term contract employee’. In terms of this definition an employee regarding the engagement between the employer and the employer, there are no objective conditions creating false expectations of renewal of the contract contained in the agreement and the contract contains a specific termination date, or stipulation indicating that the contract will terminate upon the happening of a specific event or the completion of a specified task.

⁷ Cheadle H ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 126.

⁸ These employees are appointed to a different pattern than what is perceived as the norm. Standard jobs and careers are defined as full-time, permanent, open ended and secure. Fixed term contracts are more precarious. Felstead & Jewson *Global Trends in Flexible Labour* (Macmillan Press 1999) at 1 - 2. Indefinite appointments are also the norm in South Africa. Vettori Stella ‘Fixed-term contracts in Mozambique and South Africa’ at 379. See also Gericke SB ‘A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment’ at 2 - 3. Vettori Stella *The Employment Contract and the Changed World of Work* (Ashgate Publishers 2007) at 19 fn 128.

⁹ Common indirect working arrangements are labour broking, out-sourcing and sub-contracting.

¹⁰ Thompson & Benjamin *South African Labour Law* (1965) E1 - 1.

contract' implies that the agreement is valid for a 'defined period of time' and the word 'fixed' indicates that the termination date is secure. Fixed term contracts of employment terminate on a specified date, upon the completion of a specific task, or when a specific event transpires.¹¹ A fixed term contract is usually concluded for a relatively limited duration,¹² but they may range from a matter of hours up to a period of a year or more.¹³

A new definition for 'fixed term contract' is introduced for purposes of the application of s 198 of the Labour Relations Amendment Bill of 2012.¹⁴ 'Fixed-term contract' is defined herein as a contract of employment which terminates upon the occurrence of a stipulated event or the completion of a particular task or a fixed date other than the normal retirement age.¹⁵ This definition is the same as the definition that is used for purposes of this thesis.

2 The prevalence and nature of fixed term employment in South Africa

Fixed term employment is a global phenomenon. There has been a worldwide increase in flexible working arrangements since 1970.¹⁶ The increase in atypical employment often gives rise to informalisation¹⁷ and segmentation of the workplace. Factors such as

¹¹ The latter two contingencies are also specifically provided for in terms of art 2(a) of the ILO Convention No. 158 of 1982 on Termination of Employment. See also Grogan *Employment Rights* (Juta 2010) at 62 and Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1274.

¹² 'Limited duration' contracts have been held to be a species of fixed term contract that is even more vulnerable since they attach no redundancy-type rights. *National Union of Metalworkers of SA & others v SA Five Engineering (Pty) Ltd & others* (2007) 28 ILJ 1290 (LC) at paras 39 & 42.

¹³ There are no common law restrictions on the period of appointments in terms of fixed term contracts. Such a contract may be concluded for a day, a week-end or for a number of years. The period of appointment is usually linked to the standard of professionalism required. Casual workers are appointed for shorter periods than professional employees. See Bhorat H & Cheadle H 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' DPRU Working Paper 09/139 at 22.

¹⁴ Labour Relations Amendment Bill 2012 accessed at <https://www.labour.gov.za/> (27 November 2012). See also the discussion in Ch 6 under 6.2.

¹⁵ Section 198B(c) of the Labour Relations Amendment Bill of 2012.

¹⁶ In the EU, for instance, there has been a steady increase in the number of fixed term employees in the workforce. In 2009 the proportion of employees employed in terms of a fixed term contract was 13.6%. This figure rose to 13.9% in 2010 and 14.0% in 2011. Eurostat 2011 'Proportion of employees with a contract of limited duration, age group 15 – 64' accessed at [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Proportion_of_employees_with_a_contract_of_limited_duration,_age_group_15-64,_2011_\(%25_of_total_employees\).png&filetimestamp=20121030183425](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Proportion_of_employees_with_a_contract_of_limited_duration,_age_group_15-64,_2011_(%25_of_total_employees).png&filetimestamp=20121030183425) (20 March 2013).

¹⁷ When secure indefinite employment is replaced by atypical employment in which employees have access to fewer benefits and job security, it is described as informalisation. It has been noted that in South Africa specifically, the increase of insecure atypical working relationships had the effect of decreasing

globalisation, economic, social and technological changes and amendments to legislation in order to adapt to the increasingly competitive environment have contributed to the informalisation of the workplace.¹⁸

Many countries have introduced mechanisms aimed at deregulating standard employment in order to avoid the development of an over-represented informal sector in the labour force.¹⁹ Pressures on economies and on small and large corporations to compete in a globalised world and to promote employment have led to the deregulation of labour. Permanent, full time employment is steadily eroding and fixed term contracts and other informal working arrangements are becoming increasingly prevalent at all levels of the workforce.²⁰

It is very difficult, if not impossible to indicate how many fixed term employees are working in South Africa. Statistics South Africa has collected information regarding employment since 2006. However, the questions asked in these surveys do not specifically pertain to fixed term employment. In different surveys, different definitions for 'temporary work' are used.²¹ In addition, a common problem related to surveys dealing with permanent and temporary employees is that as a result of the lack of a definition of 'temporary work', some fixed term employees may regard their appointments as being indefinite.²² It is also not uncommon for employees to under-

permanent employment as evidenced by the statistics. In this regard, see Mills Shereen W 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility' (2004) 25 ILJ 1203 at 1212.

¹⁸ See the Introduction to Ch 6 of Vettori Stella *The Employment Contract and the Changed World of Work* (2007). See also the introduction to Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247.

¹⁹ Generally the concern is that casualisation, externalisation and informalisation will cause degradation of permanent employment. In this regard see Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1248 *et seq.* In the UK for instance before the enactment of the Employment Relations Act of 1999, it used to be possible for fixed term employees to waive their rights to bring an unfair dismissal claim by agreement. It also used to be possible to waive the right to redundancy payments. See *BBC v Ioannou* [1975] ICR 267 (CA). See also *Open University v Triesman* [1978] ICR 524 (EAT) in which the application of this principle was scrutinised. This is no longer the case, presumably because of the abuse that ensued. In the first half of the 1980's Spain opted to deregulate temporary employment so as to increase market flexibility in an attempt to stimulate employment. Due to the abuse that ensued in 1984 measures were introduced to regulate fixed term employees without affecting the strict protection that permanent employees enjoy. This led to segmentation of the labour market and over-representation of the component of employees appointed in terms of fixed term contracts. See Ayuso I Casals Joaquim 'Fixed term contracts in Spain: A mixed blessing?' *ECFIN Country Focus* Vol. 1 (1) (2004) 1 - 2.

²⁰ Felstead & Jewson *Global Trends in Flexible Labour* (1999) at 3.

²¹ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1260 – 1261.

²² See Burchell B, Deakins S & Honey S *The Employment Status of Individuals in Non-standard Employment*, EMAR Research Series no 6 (London: Department of Trade and Industry 1999).

represent their income in surveys.²³ Even the Regulatory Impact Assessment of 2010²⁴ (**RIA of 2010**) which was drafted by very knowledgeable persons, has been criticised for the use of various assumptions to establish the impact because of the lack of accurate and clear statistics regarding fixed term employment.²⁵ Therefore, what follows below should not be taken as completely accurate, but only as an indication of the incidence and nature of fixed term employment in South Africa.

There seems to have been a steady increase in the proportion of atypical employees in South Africa's labour market. Between 2000 and 2010 the data suggests an estimated increase from 1.55 million to 3.89 million atypical employees in the country.²⁶ The 2007 September Labour Force Survey indicates that about five percent (almost 700 000 employees) were employed on a fixed term contracts. Ten percent (about 1.4 million workers) were employed on a temporary contract. About 81 000 were classified as seasonal workers. In total, approximately 2.13 million workers or sixteen percent of the workforce were classified as fixed term, temporary or seasonal workers.²⁷ Since 2008 about 60 percent of South Africa's workforce was appointed in permanent appointments.²⁸ Approximately fifteen percent of the surveyed workers indicated that they were appointed in terms of contracts of a limited duration, while between twenty and 30 percent indicated that they were appointed for an unspecified duration.²⁹

The Annual Report of the Commission for Employment Equity for 2009/2010 which reflects information regarding employers who employ 150 or more employees indicates that in 2010 approximately fourteen percent of the surveyed employees were 'temporary'.³⁰ It is estimated that South Africa's workforce currently contains a segment

²³ ILO Global Wage Report Africa Brief 2010/2011 at 7.

²⁴ Bhorat Haroon & Cheadle Halton 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' Development Policy Research Unit University of Cape Town 2010 PB 10-27 accessed at <http://www.dpru.uct.ac.za/sites/default/files/sites/default/files/DPRU%20PB%2010-27.pdf> (5 November 2012).

²⁵ See the BUSA 'Submission to parliament on labour amendment' accessible at http://www.busa.org.za/docs/25%20July%20BUSA_submission_to_parliament_on_labour_amendments_28_June_2012.pdf (22 August 2012).

²⁶ Statistics South Africa Survey P0211 - Quarterly Labour Force Survey (QLFS) 2nd Quarter of 2010 accessed at <http://www.statssa.gov.za/> (21 March 2013). It should be noted that this figure covers not only fixed term employees as defined herein, but also sub-contractors.

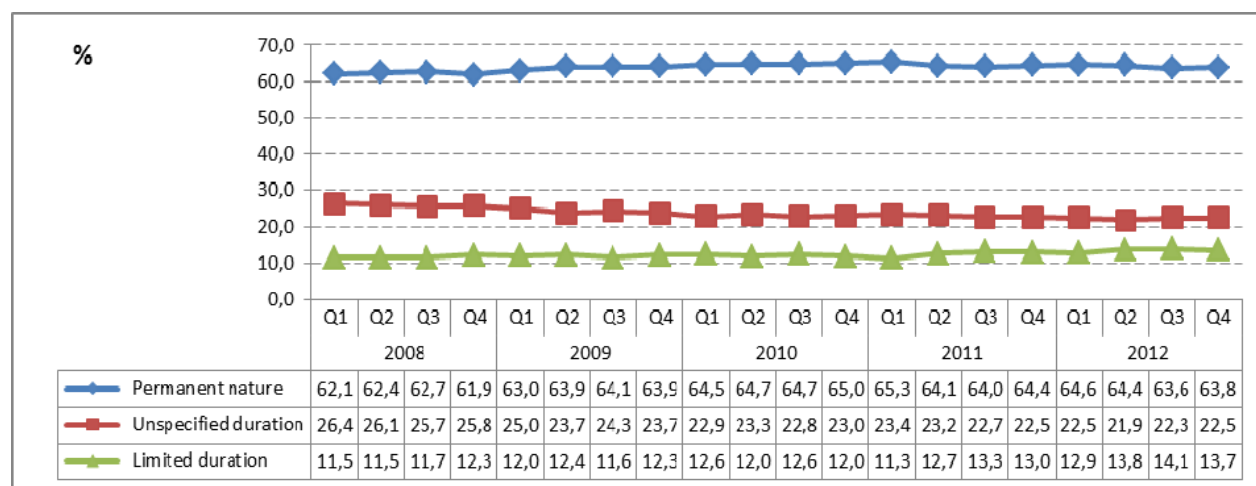
²⁷ Statistics South Africa September 2007 Labour Force Survey accessed at <http://www.statssa.gov.za/> (21 March 2013).

²⁸ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2013' at xi. Accessed at <http://www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf> (19 September 2013).

²⁹ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2013' at v.

³⁰ RIA of 2010 at 69.

of employees appointed in terms of limited duration contracts of roughly thirteen percent.³¹



Source: Statistics South Africa P2014 4th Quarter 2012 Report

The table above indicates the 2012 statistics regarding the prevalence of fixed term employment in South Africa. Although some workers may have indicated in the survey that they are appointed in terms of an unspecified duration while in actual fact they are fixed term appointees, fixed term employees appear to form a relatively small, but significant portion of the South African labour force.

In as far as the occupational composition in South Africa is concerned fixed term appointments are widespread in various employment sectors.³² According to the 2012 statistics managerial fixed term employees accounted for about 1.35 percent of workers surveyed. About 8.3 percent of the fixed term employees filled professional positions. Fixed term employees in elementary work accounted for 29.15 percent, craft and trade workers for 17.17 percent and domestic workers 13.89 percent of workers surveyed. It is common practice for employers to appoint employees in precarious positions, like cleaning services and other forms of casual employment,³³ on a temporary basis. About 13.33 percent were appointed in service and sales work, 9.43 percent were operators

³¹ This data is not the same as the data in OECD publishing 'OECD Outlook 2012 Incidence of temporary employment 2012 Percentages' which indicates that only about 11.2 percent of the South African labour force was appointed temporarily in 2011.

³² Grogan John Adv. 'Dashed expectations Limiting the scope of section 186(1)(b)' Vol. 28 No. 2 *Employment Law Journal*.

³³ A 'casual worker' or 'day labourer' is someone who works for less than 24 hours per month. They are expressly excluded from the BCEA in terms of ss 6, 19, 28 and 36 thereof.

and assemblers, 6.76 percent were appointed as clerical workers and 0.04 percent were classified as 'unspecified'.³⁴

A fixed term contract is usually concluded for a relatively short period of time which is stipulated in the contract of employment. Fixed term contracts are often used in circumstances where the nature of the task to be performed is specific or the job is limited to a specific period.³⁵ However, fixed term employment is not always temporary. Due to changing workplace policies it has become increasingly prevalent to appoint employees in terms of fixed term contracts even if the nature of the work better suits a permanent appointment. The rationale for the conclusion of fixed term contracts is usually to stand in for someone else during his or her absence, or to assist temporarily to complete a specific task.³⁶ It is for this reason not uncommon for employers to appoint persons in a fixed term basis where the nature of the work better suits a permanent appointment. South African fixed term employees are often appointed for periods exceeding three or even five years or longer.³⁷

3 Unemployment and informalisation

The high level of unemployment has resulted in expansion of the informal economy. There has also been a rise in atypical forms of work. Atypical work often exposes employees to unacceptable working conditions and possible exploitation. South Africa

³⁴ Benjamin Bhorat & Van der Westhuizen 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010, Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010' at 70.

³⁵ *SACTWU v Mediterranean Woollen Mills Ltd v SA Clothing & Textile Workers Union* 1998 (2) SA 1099 (SCA) at para 18.

³⁶ This type of contract is usually used because the employer is aware of the fact that a person will only be needed for a specific period of time. Other motivations for the conclusion of fixed term contracts may include the fact that the organisation's regulations favours this type of engagement, the fixed term contract is used as a type of probation or if the employer regards fixed term employment as less costly than continuous employment or a person is required for temporary specialised work. For a further discussion on the motivations for the conclusion of fixed term contracts see Waite M & Will A 'Fixed-term Employees in Australia: Incidence and Characteristics' Productivity Commission Staff Research Paper (Ausinfo 2002) at 5 - 10.

³⁷ Benjamin, Bhorat & Van der Westhuizen 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010' at 72.

has very high levels of poverty and income inequalities. The majority of employed South Africans earn very low salaries.³⁸

The legitimacy and appropriateness of labour regulation measures are among other factors, measured by their effect on economic efficiency.³⁹ One of the aims of labour regulation is to promote competitiveness of business while at the same time advancing labour flexibility. Labour flexibility is often viewed as counteractive to high unemployment. Labour legislation is enacted in reaction to socio-economic circumstances.⁴⁰ Therefore, it is imperative especially where employment security regulation is scrutinised to reflect on pressing socio-economic circumstances. The correlation between the cost of regulating of job security of fixed term employees and how it impacts on the economy is something that remains to be tested in South Africa.

South Africa's post-apartheid labour market regime is described as having adopted labour legislation that provides certainty and security to employers and employees. But, the balance between employment security and the flexibility that encourages appointment of new employees is still in a process of negotiation between the economic role-players.⁴¹ Crucial aspects are South Africa's societal set up and the obligations related to gender and race.⁴²

South Africa has one of the highest unemployment rates in the world.⁴³ This is probably the greatest welfare challenge in the country since its democratisation.⁴⁴ Unemployment

³⁸ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 27.

³⁹ Other factors such as the appropriateness of legislative intervention when measured by their effect on human rights would also play a role. See the discussion in Ch 5 under 5.1.

⁴⁰ See the Introduction to Ch 1 of Vettori *The Employment Contract and the Changed World of Work* (2007).

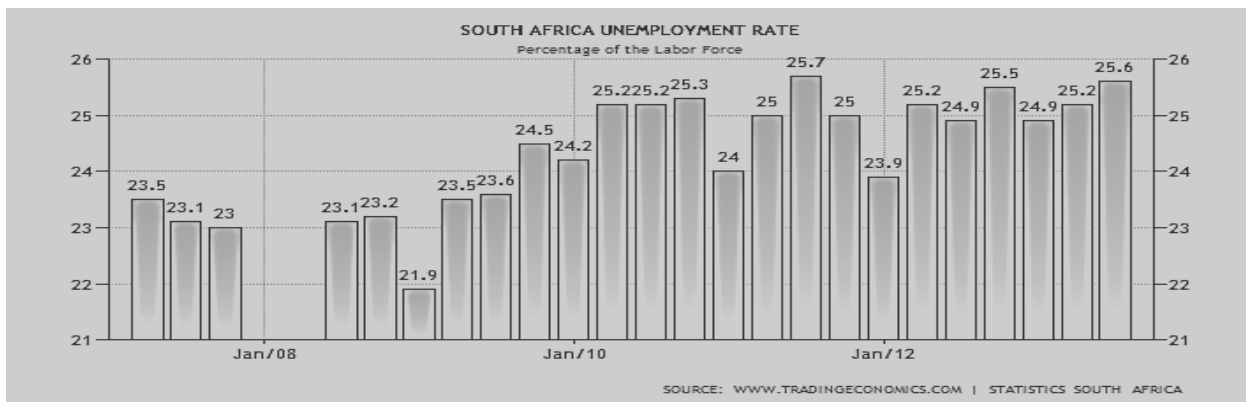
⁴¹ 'Towards Ten Years of Freedom - Progress in the First Decade - Challenges of the Second Decade' accessible at www.10years.gov.za/review/docs/10yrtab.doc (23 August 2012).

⁴² Felstead & Jewson *Global Trends in Flexible Labour* (Macmillan Press 1999) at 9. The patterns of social differentiation and inequality in South Africa are aspects that effect employment trends. Despite legislated interventions, statistically South Africa's labour market remains predominantly white and male.

⁴³ South Africa's unemployment rate is currently about 25% or 40% depending on which the definition is used. The unofficial definition of 'unemployment' includes those workers not actively seeking work, known as discouraged work seekers. When this group is included the unemployment figure becomes significantly higher. See also the ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 9. Accessed at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@integration/documents/genericdocument/wcms_145432.pdf (19 September 2013).

⁴⁴ Borat & Cheadle 'Labour Reform in South Africa and a Synthesis of Policy Suggestions' DPRU Working Paper 09/139 (September 2009) at 1.

has grown by 26 percent since 1994.⁴⁵ In 2008 there were approximately 3.9 million unemployed persons in South Africa. By the end of 2012 about 4.5 million of the country's workforce was unemployed.⁴⁶ In 2013, the unemployment picture has become even bleaker. In the first quarter of 2013 25.2 percent of the eligible workforce was unemployed. In the second quarter of the year there was an increase to around 25.60 percent.⁴⁷



The high unemployment rate enables employers to offer less attractive jobs. Fixed term employees have become more vulnerable to exploitation in the course of employment since they are less likely to quit their jobs and look for better work in South Africa's depressed labour market conditions. With the unemployment rate at such a high level, any threat of decreases in employability would be devastating. Unfortunately, employers are permitted to openly use the unfortunate circumstances to their advantage because of the lack of effective regulation. It is probable that, due to the country's high employment rate, fixed term employees in South Africa are not temporarily employed by choice, but rather out of necessity.

The national skills shortage is another important factor that influences labour policy. People with low levels of education are at a very high risk of unemployment or employment in low-paid work. In the first quarter of 2008 about 64 percent of the unemployed did not have matric. Only 5.2 percent of persons who were unemployed

⁴⁵ Borhat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' at 39.

⁴⁶ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 4, 2012' at xiv. Accessed at <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2012.pdf> (21 March 2013).

⁴⁷ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2013' at v. Accessed at <http://www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf> (19 September 2013).

had tertiary qualifications. In 2012 about 59.3 percent of the unemployed did not have matric and 6.3 percent of the unemployed had tertiary educations.⁴⁸

It is also evident from the available statistical data that there are still very high levels of wage inequality across and within South African population groups in respect of employment as well as rate of pay remnant to historic discriminatory practices in the country.⁴⁹ In 2007 approximately 32.5 percent of employees in South Africa earned low pay.⁵⁰ Of these unfortunate employees, 41.9 percent were black, 26.1 percent coloured, 7.2 percent Asian and only 1.8 percent white. Women were also markedly higher represented within the low wage category at 36.4 percent compared to the 29.7 percent of men earning low wages.⁵¹

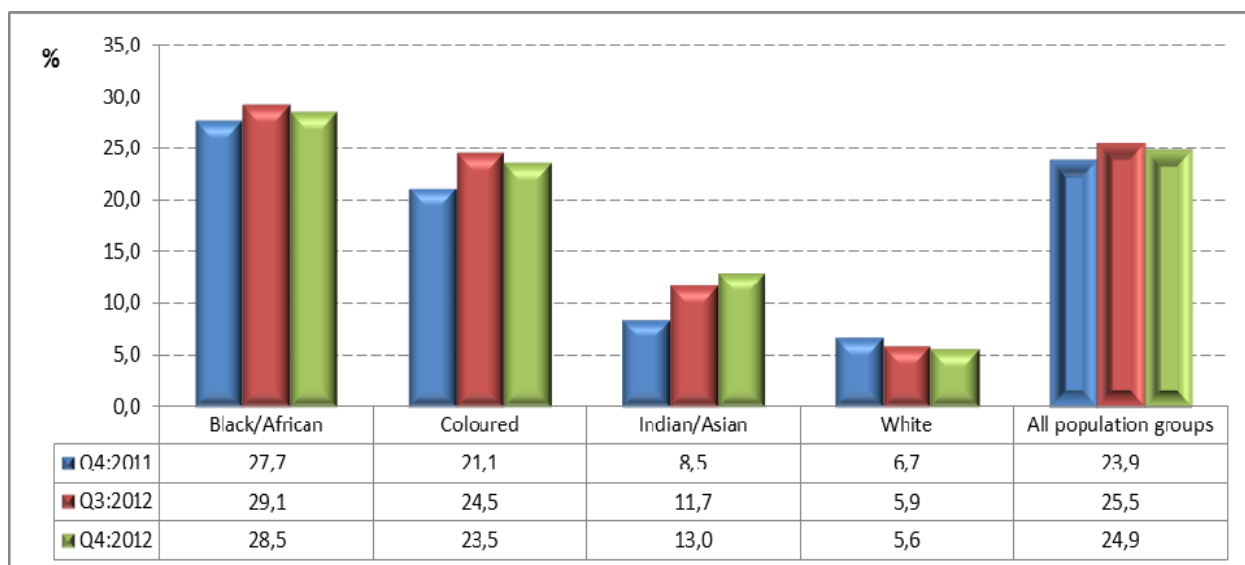
⁴⁸ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2012' at xv. Approximately 20.8 percent of whites have a tertiary education. This is currently South Africa's most educated population group. The unemployment rate for this population group is the lowest at 5.7 percent. For blacks the unemployment rate is approximately 28.7 percent. Coloured South Africans have an unemployment rate of 24 percent and Indians 9.5 percent. In this regard see Roodt Dawie 'Lesse vir Groter Welvaart: Waarom ons Arbeidsbestel nie Werk nie' *Huisgenoot* (15 August 2013) 22 at 23.

⁴⁹ ILO Global Wage Report, African Brief 2010/2011 at 16. South Africa had a Gini Coefficient of 0.631 in 2009. The Gini Coefficient is a measure for inequality with 0 representing absolute equality and 1 presenting absolute inequality. See World Bank 'GINI Index' accessed at <http://data.worldbank.org/indicator/SI.POV.GINI> (23 March 2013). See also Ramutloa Lloyd 'Speech by the Minister of Labour, Hon. Mildred N Oliphant, MP on the occasion of the Employment Equity and Transformation Indaba, Birchwood, Johannesburg' accessed at <https://www.labour.gov.za/media-desk/speeches/2013/speech-by-the-minister-of-labour-hon-mildred-n-oliphant-mp-on-the-occasion-of-the-employment-equity-and-transformation-indaba-birchwood-johannesburg> (21 May 2013).

⁵⁰ This means that these employees earn an hourly wages which is less than two thirds of the median wage across all jobs. This is the definition accepted for low wages in the ILO's decent work indicators 'Decent Work Indicator for 'low pay rate' accessible at http://www.ilo.org/wcmsp5/groups/public---dgreports/---integration/documents/meetingdocument/wcms_115402.pdf (23 August 2012).

⁵¹ ILO Global Wage Report, African Brief 2010/2011 at 14. See also ILO 'Global Wage Report 2012/13' (ILO Geneva 2012) at 32. Accessed at <http://www.ilo.org/global/research/global-reports/global-wage-report/2012/lang--en/index.htm> (26 March 2013).

The table below indicates the ratio of unemployed persons in different racial groups in South Africa between 2011 and 2012.



Source: Statistics South Africa P2014 4th Quarter 2012 Report

Discriminatory practices have survived the death of apartheid in South Africa. The unemployment statistics and wage distribution data clearly indicate discrepancies between employment and payment based on sex and race. This has a significant impact on the regulation of fixed term employment. Currently there is no equal pay provision in the South African legislation despite the existence of a considerable pay gap that remains between men and women and between the different constitutive races in the South African populace.⁵²

While equality legislation exists the difficulty is in implementing it. Many challenges face employees, including fixed term employees who want to pursue an equal pay case. The ILO has criticised South Africa's equality legislation due to the fact that no provision is included to deal specifically with wage discrimination. Currently there is no clear basis for equal pay claims. The absence of a cause of action based on this essential element of employment falls foul in respect of the constitutional guarantee of the right to equality and the core international labour standards applicable to South Africa.⁵³ Contractual

⁵² McGregor Marié 'Equal Remuneration for Same Work or Work of Equal Value' at 490 – 491.
⁵³ South African Department of Labour '10th CEE Annual Report 2009 – 2010' at 3. Accessed at https://www.labour.gov.za/downloads/documents/annual-reports/employment-equity/2009-2010/10thCEEreport_part1.pdf (28 May 2013).

status is also not one of the listed grounds in South Africa's anti-discrimination legislation.⁵⁴

The fact that fixed term employees are often not provided with the same skills development opportunities as permanent employees limits their access to permanent appointments even more.⁵⁵ The inequity between the different segments of the labour force based on gender and race also affects the impetus of employing employees in the under-represented categories.⁵⁶

4 Research aims and synopsis

The aim of this thesis is to consider the shortcomings of the legislative provisions applicable to fixed term employees and in particular those affecting job security of this vulnerable group of employees. The current legislative framework is evaluated to uncover certain discrepancies between the protections provided to fixed term employees in comparison to the rights that indefinitely appointed employees enjoy. It is important to consider the flaws if the status quo is maintained in order to evaluate whether legislative interventions that have been proposed are necessary and whether or not they will prove to be effective in the South African labour milieu.

South Africa's Constitution is exceptional in the sense that it provides the right to fair labour practices.⁵⁷ This constitutional right is given effect to by the LRA.⁵⁸ Generally speaking South African fixed term employees have the same legislative rights as permanently appointed employees. However, some fixed term employees are expressly excluded from the operation of the legislation itself. The scope of protection provided under the legislation is often intrinsically limited.⁵⁹ The courts in the development of the common law, or in their reluctance to develop the common law in circumstances where it is required in order to extend protection to also cover fixed term employees, have also

⁵⁴ See the discussion in Ch 1 under 1.3.

⁵⁵ See the discussion in Ch 1 under 1.5.

⁵⁶ See the discussion regarding the potential negative effects of affirmative action in Ch 1 under 1.3.

⁵⁷ Cheadle Halton 'Labour Relations' in Cheadle Halton, Davis Dennis & Haysom Nicholas *South African Constitutional Law: The Bill of Rights 2002* (2002) 365 at 371 - 373. See also *NEHAWU v University of Cape Town* 2003 (3) SA (CC) at para 30.

⁵⁸ See the preamble to the LRA. The LRA was enacted to give effect to the constitutional right to fair labour practices contained in s 23(1) of the Constitution.

⁵⁹ See the discussion regarding the application of the various pieces of labour legislation in Ch 1 under 1.1.

played an incremental role in limiting or even in some cases excluding fixed term employees from the mechanisms that were intended to protect their job security. The effect is that fixed term employees are often denied the privileges in practice that they are in principle eligible for in terms of the legislation.⁶⁰ South Africa follows a precedent system. Therefore, the restriction of rights if not exercised in accordance with the obligations of the Constitution, has a devastatingly disastrous effect.

Except for the obvious employment insecurity, benefit insecurity, the skills reproduction insecurity and resulting income insecurity that fixed term employees are susceptible to, the unregulated environment they work in also often has negative health and social repercussions.⁶¹ Temporary workers are often uninformed of their responsibilities and those of others exposing them to higher health and safety risks. Likewise, the participatory mechanism of collective bargaining is weakened by externalisation, informalisation and casualisation to such an extent that fixed term employees can hardly rely upon it.⁶² Consequently it is imperative that individual protection is effective and achieves its intended outcome.⁶³

Specialist tribunals have been established to develop and enforce the employment legislation.⁶⁴ However, the South African dispute resolution mechanisms are accompanied by a minefield of technical obstacles. It is not uncommon for labour disputes to take years to resolve. A matter which was initially referred to the CCMA may take an extended route via the Labour Court, Labour Appeal Court, Supreme Court of Appeal and even the Constitutional Court.⁶⁵

There is currently only one stipulation in the LRA aimed at regulating termination of fixed term employment contracts.⁶⁶ Since the relevant provision is only available to fixed term employees, an expressed legislative distinction is impugned between employees

⁶⁰ See for instance *Khumalo & others v Supercare Cleaning* [2000] 8 BALR 892 (CCMA) at 897D – F and *SACCAWU obo Makubalo & others v Pro-Cut Fruit & Veg* [2002] 5 BALR 543 (CCMA) at 545E.

⁶¹ See the discussion in Ch 1 under 2.6.1.

⁶² Benjamin Paul 'Labour Market Regulation: International and South African Perspectives' at 11 accessed at www.hsrc.ac.za/en/research-outputs/ktree-doc/1312 (21 March 2013).

⁶³ *Johnson v Unisys Ltd* (2001) 2 All ER 801 at 811.

⁶⁴ Grogan John *Workplace Law* 10th edn (Juta 2009) at 4.

⁶⁵ See for instance the case of *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* (2010) 31 ILJ 273 (CC).

⁶⁶ Section 186(1)(b) of the LRA.

on permanent employment contracts and those appointed in terms of fixed term contracts.⁶⁷

The burden of proof resting on fixed term employees claiming based on unfair dismissal is more onerous than for indefinitely employed persons. The right of fixed term employees to scrutinise the fairness of an employer's conduct is made conditional upon being able to prove the existence of a reasonable expectation. Factors taken into consideration when establishing whether or not a reasonable expectation exists have been laid down by the courts. But, in each case the surrounding circumstances are considered. In the absence of clear guidelines for the proof of a reasonable expectation, the presiding officer's subjective preconceptions often influence his or her decision as to whether or not a fixed term employee was dismissed.⁶⁸

What the nature of the expectation should be that the employee should harbour in order to enjoy the protection offered by the LRA has been controversial.⁶⁹ Uncertainty regarding the jurisdiction of the CCMA ensued from 1999 until 2011. In a recent decision the Labour Appeal Court⁷⁰ confirmed that fixed term employees who have a reasonable expectation of permanent appointment do not enjoy the statutory protection against unfair dismissal. A fixed term employee must therefore prove the existence of a reasonable belief that his or her employment would continue, but if the expectation is too strong or deemed to be an expectation of a permanent appointment, he or she may be left remediless. The Labour Appeal Court in making this judgment did not follow the prescripts on construction of the LRA that have been laid down by the Constitutional Court.⁷¹

In order to address the inadequacy of the current legislative framework applicable to fixed term employees, amendment of the LRA has been proposed. The proposed amendments will increase the income security of fixed term employees, but the provision of job security always comes at a cost.

⁶⁷ See the discussion in Ch 3 under 3.2.1.

⁶⁸ See the discussion under 3.2.3 in Ch 3.

⁶⁹ This is discussed further in Ch 5 under 5.2.

⁷⁰ *University of Pretoria v CCMA & others* [2011] ZALAC 25.

⁷¹ See the discussion under 5.3 in Ch 5.

This thesis achieves the following research outcomes:

- (1) It provides an overview and conveys an understanding of the regulatory provisions pertaining to dismissal protection applicable to fixed term employees;
- (2) It illustrates in which ways and to what extent fixed term employees in South Africa are treated differently from employees in permanent employment;
- (3) It assesses the efficiency of current legislative protection against unfair dismissal afforded to fixed term employees;
- (4) It evaluates whether or not stricter regulation of fixed term employment is necessary and to what extent fixed term employees should be protected in order to meet South Africa's international and constitutional obligations;
- (5) It examines the possible impact the proposed reform will have on fixed term employees.

Chapter 1 provides an overview of the rights that fixed term employees are entitled to in terms of the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA) against the backdrop of the Constitution of the Republic of South Africa of 1996 (Constitution). The focal point is the protection provided to fixed term employees in terms of the unfair labour practice provisions and unfair dismissal provisions. The ways in which fixed term employees are prejudiced by disparate protection provided in terms of the labour legislation is investigated.

In **Chapter 2** some important common law provisions pertaining to termination of fixed term contracts of employment is investigated. As far as the practical enforcement of common law rights is concerned, attention is given to the burden of proof, procedural aspects for enforcement and the scope and availability of remedies to fixed term employees. The question whether or not an action based on breach of contract may be brought instead of and/or in addition to the statutory grounds which are intended to supplement the common law rights is posed. It is considered whether or not the legislation extends or restricts the common law protections.

In **Chapter 3** the substance and practicality of the statutory right not to be unfairly dismissed that fixed term employees enjoy is analysed by considering the scope of application, the burden of proof and the availability of the remedies as contained in the LRA.

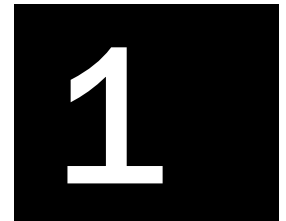
In **Chapter 4** the jurisdictional uncertainties and problems emanating from over-technicality and tedious dispute resolution processes is examined with reference to case law in point to discover the existence of underlying lacunae in the legislative protection provided to fixed term employees in terms of the LRA.

In **Chapter 5** the role of the Constitution in the interpretation of labour legislation, and the duty of the courts to develop the common law in accordance with the entrenched values is set out and evaluated. By applying these principles to case law dealing with unfair dismissal of fixed term employees, it is indicated that the current interpretation of s 186(1)(b) of the LRA is not aligned with the constitutional values.

Chapter 6 deals with some of the proposed amendments to the South African legislation that are of specific relevance to fixed term employees. Having regard to South Africa's international obligations and the dismissal protection provided in various other countries, whether and to what extent these changes comply with international standards and are capable of addressing the problems that are present in the current legislative protection is investigated. The possible positive and negative effects of the legislative reform are considered.

The conclusion provides a summary of the findings. Some practical recommendations are put forward to address some of the problems identified in the research.

The statutory rights of fixed term employees



Introduction

The key objective of this chapter is to provide an overview of certain legislative interventions that are applied in the South African labour market that affect fixed term employees in particular. It should be noted that the aim is not to provide a complete depiction of all the legislative interventions. The core rights that are incremental to the dismissal protection that fixed term employees enjoy is spotlighted. This is referred to in the rest of thesis in order to identify particular anomalies and institutional challenges in the practical application of the dismissal protection available to fixed term employees.

South Africa has established mechanisms to redress the inherent inequality in the employment relationship and to promote the objectives of labour law.⁷² Many conditions that are made applicable to employees generally have been legislated.

As the Constitution of the Republic of South Africa is the pinnacle against which all other national legislation is measured⁷³ and because many of the labour and other social legislation have been enacted to give effect to the constitutional provisions,⁷⁴ the Constitution is set as a backdrop in the discussion of the respective legislative rights that fixed term employees enjoy. It should be noted that the Constitution applies to 'everyone' and not only to fixed term employees.⁷⁵ As the labour legislation is more

⁷² Modern labour law is aimed at promoting efficiency and economic growth; macro-economic management by achieving wage stabilisation to countenance high unemployment so as to promote competitiveness; the establishment and protection of human rights and redistribution of wealth and power. Klare K 'Countervailing Worker's Power as a Regulatory Strategy' in Collins Hugh, Davies Paul L & Rideout Roger (eds) *Legal Regulation of the Employment Relation* (London: Kluwer Law International, London, UK 2000) at 68.

⁷³ Section 2 of the Constitution proclaims it the supreme law of the country. Section 8(1) determines that the Bill of Rights is applicable to all law.

⁷⁴ The LRA, BCEA and EEA were all enacted to give effect to s 23 of the Constitution which guarantees the right to fair labour practices.

⁷⁵ Section 7(1) of the Constitution determines that the Bill of Rights applies to 'all people in the country'. Section 23 of the Constitution determines that 'everyone' enjoys the right to fair labour practices. See also the discussion under 1.2 below.

restricted in application it is necessary to explain the scope of application of the labour legislation before the discussion is embarked upon.⁷⁶

The Bill of Rights⁷⁷ as contained in the Constitution is premised on the notion of equality before the law.⁷⁸ Various other specific rights flow from the right to equality including the right to fair labour practices,⁷⁹ the right to dignity,⁸⁰ freedom and security,⁸¹ the right to freely associate,⁸² the right to access the courts,⁸³ the right to participate freely in trade or a profession of own choice⁸⁴ the right to a safe and healthy environment⁸⁵ and the right to basic education.⁸⁶ These constitutional rights all impact on the way that national labour legislation is enacted, interpreted and applied.

1.1 Qualifications for eligibility to rights in labour legislation

Only persons acknowledged as 'employees' have recourse to the dispute resolution mechanisms as contained in the labour legislation.⁸⁷ In cases of discrimination⁸⁸ and victimisation,⁸⁹ applicants for employment also enjoy protection under certain provisions.⁹⁰ The unfair dismissal protection applies to all employers and employees in the public and the private sectors except for those expressly excluded in the legislation itself.

The LRA defines 'employee' as a person that is not an independent contractor who works for another person or for the State and who receives remuneration, or someone who is entitled to receive such remuneration. The definition also includes persons

⁷⁶ See the discussion under 1 below.

⁷⁷ The Bill of Rights is situated in Ch 2 of the Constitution.

⁷⁸ Section 9 of the Constitution. See also Currie & de Waal *The Bill of Rights Handbook* (2005) 230 - 234.

⁷⁹ Section 23 of the Constitution.

⁸⁰ Section 10 of the Constitution.

⁸¹ Section 12 of the Constitution.

⁸² Section 17 and 18 of the Constitution.

⁸³ Section 34 of the Constitution.

⁸⁴ Section 23 of the Constitution.

⁸⁵ Section 24 of the Constitution.

⁸⁶ Section 29 of the Constitution.

⁸⁷ Section 213 of the LRA does not expressly exclude fixed term employees from the statutory definition of 'employee.' The BCEA and EEA define 'employee' in similar terms as the LRA. See also s 1 of the BCEA and s 1 of the EEA.

⁸⁸ Sections 6(9) & 9 of the EEA.

⁸⁹ Section 5(2) & (3) of the LRA.

⁹⁰ Grogan *Employment Rights* (2010) at 15.

assisting in the carrying on of the employer's business.⁹¹ It has been held that 'a person or persons who has or have concluded a contract or contracts of employment, the commencement of which is or are deferred to a future date' should also be included under the definition of 'employee'.⁹²

'Employer' is not currently defined in the legislation but has a corresponding meaning to 'employee'.⁹³ Fixed term employees working for labour brokers generally have problems in the enforcement of rights due to the fact that it is not always clear who the employer is in the tri-partite set-up.⁹⁴ In *Zolwayo v Sparrow Task Force Engineering (Pty) Limited & another*⁹⁵ the fixed term employee was employed by the agency and assigned to work for a client on a project. After completion of the project, he was offered alternative employment by the agency. The employee refused the offer claiming that he was employed by the client. The employee instituted an action based on unfair dismissal against both the agency and the client. The arbitrator held that the agency was the employer and that no dismissal had occurred since the contract had come to an end automatically at the end of the project.

Likewise in *Dyalvani and City of Cape Town*⁹⁶ the client claimed that the contract was concluded between the employee and the labour broker and that a claim should have been instituted against the labour broker instead. The commissioner conceded that the labour broker was the employer and made an award to the effect that the bargaining council lacked jurisdiction to entertain the dispute.

Even in instances where the employer is identified, enforcement of rights is not always easy for fixed term employees employed by labour brokers. For instance, the client in a tri-partite relationship is considered to be the employer for purposes of compliance with health and safety legislation. However, an employee would not be able to claim compensation for occupational injuries and diseases from the client.⁹⁷ Even though atypical work in the form of labour broking has had a positive job creation effect and has seemingly contributed positively to employment, the fact that these labour relationships

⁹¹ Section 213 of the LRA.

⁹² *Wyeth SA and T Manqele* (2005) 26 ILJ 749 (LAC) at para 52.

⁹³ Section 213 of the LRA.

⁹⁴ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1256.

⁹⁵ *Zolwayo v Sparrow Task Force Engineering (Pty) Limited & another* [2006] 6 BALR 599 (MEIBC).

⁹⁶ *Dyalvani and City of Cape Town* [2013] JOL 30173 (SALGBC).

⁹⁷ *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 at para 44.

have been inefficiently regulated has resulted in negation of fixed term employees' rights.⁹⁸

No distinction is made between various types of South African employees.⁹⁹ The statutory definition of employee does not distinguish between the different categories of employees in terms of the terms of their appointments, their contractual status or their seniority.

It would not have made sense to exclude employees from the protection of labour legislation because they are appointed in terms of a fixed term contract. An employee appointed for an indefinite period could be appointed on a full-time or part-time basis. An indefinite contract is, like a fixed term contract, a periodic contract. It is tacitly relocated at the beginning of each fresh period. An indefinite contract also terminates automatically when the employee dies or reaches the prescribed retirement age.¹⁰⁰

The LRA expressly excludes members of the South African National Defence Force, the National Intelligence Agency, the National Secret Service, the National Intelligence Agency and the Academy of Intelligence from the legislation's protection.¹⁰¹

Fixed term employees are not as a group excluded from the LRA's application. As fixed term employees fall under the statutory definition of employee, except if they fall within a category that is excluded, they enjoy the legislative protection against unfair discrimination, unfair labour practices and unfair dismissal.¹⁰²

Fixed term employees are also recognised as 'employees' for purposes of the rights as contained in the BCEA.¹⁰³ The BCEA, like the LRA, completely excludes certain employees (and therefore also fixed term employees falling within these groups) from its operation. Fixed term employees employed by the National Intelligence Agency, the

⁹⁸ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 10.

⁹⁹ No differentiation is made in respect of terms or periods of appointments. The definition in the LRA is repeated in the BCEA and EEA. Therefore (except for those expressly excluded) fixed term employees also enjoy the protection provided therein. See the definitions of 'employee' in s 213 of the LRA and s 1 of the BCEA & EEA respectively. Grogan *Employment Rights* (2010) at 96. See also Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1274.

¹⁰⁰ *Kirsten and Southern Cross Manufacturing CO Ltd t/a Southern Cross Industries* (2006) 27 ILJ 2471 (CCMA). Grogan *Employment Rights* (2010) at 64.

¹⁰¹ Section 2 of the LRA.

¹⁰² Grogan *Employment Rights* (2010) at 11.

¹⁰³ Section 1 of the BCEA.

Secret Service, the Intelligence Agency, the South African National Academy of Intelligence and COMSEC¹⁰⁴ are excluded. Furthermore, unpaid volunteer workers working for charities are not covered by the BCEA. Merchant seamen are also excluded except in as far as they are entitled to severance pay if they are retrenched¹⁰⁵ and other rights provided for in a sectoral determination.¹⁰⁶ The BCEA also excludes senior managerial employees from the scope of the provisions related to working time.¹⁰⁷ In addition, persons earning above a specified threshold amount are also excluded from certain provisions.¹⁰⁸ Employees who work for less than 24 hours per month are excluded from the provisions pertaining to working hours.¹⁰⁹ The provisions in the BCEA on termination of employment also only exclude employees who work for less than 24 hours per month from its operation.¹¹⁰

Persons who do not fit the 'employee' concept are often also excluded from the operation of social security legislation. Although the Legislature has attempted to broaden the scope of application of certain mechanisms, major categories of workers remain excluded from the various social security mechanisms.¹¹¹ The Occupational Health and Safety Act¹¹² defines 'employee' in wider terms than the LRA does.¹¹³ For purposes of its application an 'employee' is any person who works for an employer and who receives a remuneration or who is entitled to receive remuneration or any person who works under the employer's or any other person's direction or supervision.¹¹⁴ The definition of 'employee' in the Compensation for Occupational Injuries and Diseases Act¹¹⁵ (COIDA) also covers a wider spectrum of workers than the LRA, BCEA and the

¹⁰⁴ COMSEC is a government owned electronic communication security company which forms a subdivision of Security South Africa (formerly the National Intelligence Agency). See [http://en.wikipedia.org/wiki/COMSEC_\(South_Africa\)](http://en.wikipedia.org/wiki/COMSEC_(South_Africa)).

¹⁰⁵ Section 41 of the BCEA.

¹⁰⁶ Section 3(3) of the BCEA. See also Grogan *Employment Rights* (2010) at 72.

¹⁰⁷ Section 6(1)(a) of the BCEA. See also the definition of 'senior managerial employee' in s 1.

¹⁰⁸ Section 6(3) of the BCEA authorises the Minister of Labour to determine the amount upon the advice of the Commission.

¹⁰⁹ Section 6(1)(c) of the BCEA.

¹¹⁰ Section 36 of the BCEA. See also Grogan *Employment Rights* (2010) at 73.

¹¹¹ Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) at 131 - 132.

¹¹² Occupational Health and Safety Act 85 of 1993.

¹¹³ In the Preamble to the Occupational Health and Safety Act 85 of 1993 it is made clear that this piece of legislation is aimed at protection of 'persons' whereas the definition provided in s 213 of the LRA expressly excludes independent contractors and is aimed to cover only those persons recognised as 'employees'.

¹¹⁴ Section 1 of the Occupational Health and Safety Act 85 of 1993.

¹¹⁵ See the definition of 'employee' in s 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

EEA.¹¹⁶ Employers are obliged to make payments in respect of compensation for work-related injuries and diseases in respect of all employees. Employees in atypical employment, including fixed term employment would be covered.

Who qualifies as an 'employee' has been a problem area for our courts.¹¹⁷ Generally, employees are protected by labour legislation, while independent contractors are not.¹¹⁸ The definitions of 'employee' as set out in the LRA, the BCEA, the COIDA,¹¹⁹ the Unemployment Insurance Act¹²⁰ and the Skills Development Act¹²¹ expressly exclude independent contractors. The differences between employees and independent contractors have been subject to scrutiny on various occasions.¹²²

Whether status plays a role in practice in determining whether or not someone is recognised as an 'employee' is unclear. Directors are not always considered to be employees of companies.¹²³ Executive directors usually qualify as employees, whereas non-executive directors are not considered to be employees. A distinction is made

¹¹⁶ This is to ensure that those who should logically have access to social security benefits, such as the surviving spouse of an employee who dies in the course of performing his or her duties, would have access to social security benefits. Olivier Marius 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199 at 2201.

¹¹⁷ Benjamin Paul 'An Accident of History: Who is (and Who Should be) an Employee under South African Labour Law' (2004) 25 *ILJ* 787. See also ILO 'Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship Scope)' (May 2000 Geneva) accessed at <http://www.ilo.org/public/English/dialogue/ifpdial/publ/mewnp/index.htm> (12 September 2012).

¹¹⁸ South Africa's common law is based on the Roman-Dutch law. In Roman law a distinction was made between a contract of service (*locatio conductio operarum*) and one for work (*locatio conductio operis*) which is used in the case of an independent contractor hence the distinction. Vettori *The Employment Contract and the Changed World of Work* (2007) at 3. See also *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61 and *Peter Lawson and Schmidhauser Electrical CC Case No 7596/2007* [2012] ZAWCHC 146 (1 August 2012) at paras 2 - 3.

¹¹⁹ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹²⁰ Unemployment Insurance Act 63 of 2001. In terms of s 1 'employee' is defined as a natural person who earns remuneration or to whom remuneration accrues for services rendered, except an independent contractor.

¹²¹ Skills Development Act 97 of 1998.

¹²² See for instance *SABC v McKenzie* (1999) 20 *ILJ* 585 (LAC), *Niselow v Liberty Life Association of Africa Ltd* (1998) *ILJ* 752 (SCA), *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A), *South African Master Dental Technicians Association v Dental Association of South Africa* 1970 (3) SA 733 (A), *Pam Golding Properties (Pty) Ltd v Erasmus* 2010 *ILJ* 1460 (LC), *State Information Technology Agency (Pty) Ltd v CCMA* 2008 *ILJ* 2234 (LAC), *Church of the Province of Southern Africa (Diocese of Cape Town)* [2001] 11 *BLLR* 1213 (LC) and *Van Rooyen v S* [2002] 8 *BCLR* 810 (CC) with regard to the interpretation of who is an employee and the tests applied to determine whether a person qualifies as an 'employee'.

¹²³ *Anderson v James Sutherland (Peterhead) Ltd* 1941 SC 203 at 217. See also *French Hairdressing Saloons v National Employers' Mutual General Insurance Association Ltd* 1931 AD 60; *Moresby White v Rangeland Ltd* 1952 (4) SA 285 (SR) at 288; *PG Group (Pty) Ltd v Mbambo NO* [2005] 1 *BLLR* 71 (LC) at paras 21 - 31 and *Amazwi Power Products (Pty) Ltd v Turnbull* 2008 *ILJ* 2254 (LAC) at paras 13 - 14.

between managerial functions and ordinary directors' functions.¹²⁴ For as far as a director is also responsible for executive managerial functions he or she would usually be considered to be an employee.¹²⁵ Non-executive directors¹²⁶ will rarely be afforded the protection provided in the LRA. A director who is also an employee acts in a dual capacity and the position as an employee is independent of that of a director.¹²⁷

Some individuals are considered to be mere 'office holders'.¹²⁸ Members of Parliament, provincial governments and councillors of local government for instance, are not considered to be employees.¹²⁹ In *Khanyile v CCMA & others*¹³⁰ Murphy AJ held that magistrates and judges should not be covered by the LRA since it would be inappropriate for CCMA commissioners to assess their performance. The courts have also excluded priests.¹³¹ This approach has also been adopted in England.¹³²

Different factors are considered important in determining whether or not someone is an 'employee'.¹³³ The nature of a working relationship has many nuanced possibilities. Sometimes a person's status or the nature of a relationship will be determined by considering whether or not it would fall within the statutory definition of 'employee'. In

¹²⁴ In *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC) the Industrial Court confirmed that a managing director is an employee. However non-executive directors are not considered 'employees.' See *Anderson v James Sutherland (Peterhead) Ltd* 1941 SC 203 at 217. See also *Oak Industries (SA)(Pty) Ltd v John NO & another* 1987 (4) SA 702 (N); (1987) 8 ILJ 756 (N) at 758 – 760 where Friedman J determined that a managing director would be an employee if he or she falls within the definition of 'employee' in terms of the Labour Relations Act 28 of 1956 (by analogy, in s 213 of the LRA). For an example in which the tests were applied by Molahlehi J in order to ascertain whether or not a director qualified as an employee see *Hydraulic Engineering Repair Service v Ntshona & others* (2008) 29 ILJ 163 (LC) at 169 – 171 and *PG Group (Pty) Ltd v Mbambo NO & others* [2005] 1 BLLR 71 (LC) at para 31. See also generally Larkin 'Distinctions and Differences: A Company Lawyer's Look at Executive Dismissals' 1986 (7) *Industrial Law Journal* 248. See also *Chillibush Communications (Pty) Ltd v Johnston NO & others* (2010) 31 ILJ 1358 (LC) at paras 25 – 26 & 29.

¹²⁵ See for instance *Solomons v Skyport Corporation Ltd* (2007) 28 ILJ 2871 (CCMA) at 2872E.

¹²⁶ The Companies Act 71 of 2008 does not distinguish between 'executive' and 'non-executive' directors. This distinction was made by the court in *Howard v Herrigal* 1991 (2) SA 660 (A) at 678. The King Report on Corporate Governance for South Africa, 2002 in Ch 4 para 7 defines 'executive director' as 'an individual involved in the day-to-day management and/ or in the full-time salaried employment of the company and/ or any of its subsidiaries. A non-executive director is someone who is not involved in the day-to-day management of the company or is not a full-time salaried employee of a company or its subsidiaries. The Institute of Directors of SA *King Report on Corporate Governance in South Africa, 2009* in principle 2.3 prescribes the appointment of non-executive directors.

¹²⁷ *Chillibush Communications (Pty) Ltd v Johnston NO & others* [2010] 6 BLLR 607 (LC) at paras 24 - 28.

¹²⁸ See for instance *Khanyile v CCMA & others* (2004) 25 ILJ 2348 (LC) at paras 27, 30 & 35.

¹²⁹ *Parliament of the Republic of South Africa v Charlton* [2010] 10 BLLR 1024 (LAC) at paras 27 - 31.

¹³⁰ *Khanyile v CCMA & others* (2004) 25 ILJ 2348 (LC) at paras 4, 9 - 10 & 30 - 35.

¹³¹ *Salvation Army South African Territory v Minister of Labour* (2005) 26 ILJ 126 (LC) at paras 13 – 15.

¹³² See for instance *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195 HL at paras 40 – 42, 133 – 134, 138 – 140 & 152.

¹³³ *Board of Executors Ltd v McCafferty* (1997) 18 ILJ 949 (LAC) at 968F - H.

other instances a person, who cannot be defined as an 'employee' in terms of the legislation may still be considered to be in a relationship 'akin to employment', who enjoys the constitutional protection against unfair labour practices.¹³⁴ The case law on the topic is confusing and often contradictory.¹³⁵

A statutory presumption in favour of the proposition that a person is an 'employee', exists. In terms of the LRA, if a person works for or renders services to any other person and complies with any one of seven factors¹³⁶ such a person will be presumed to be an employee until the contrary is proven.¹³⁷ The BCEA contains a similar provision.¹³⁸ In terms of s 83 of the BCEA, the Minister may also recognise persons as 'employees' by notice in the Government Gazette.¹³⁹ This statutory presumption has not been included in the COIDA,¹⁴⁰ the UIA,¹⁴¹ the Skills Development Act,¹⁴² the EEA, and the OHSA.¹⁴³ In any event, the guidance provided in terms of the statutory presumption is so circular as to render it absolutely useless.

The Department of Labour also issued guidelines to assist in determining who qualifies as an employee for purposes of labour protection.¹⁴⁴ These guidelines provide a summary of the most pertinent case law in point.¹⁴⁵ Unfortunately, it does little more in providing clarity on this jurisdictional aspect. Ultimately, it seems that the courts are still led by the dominant impression regarding the nature of the relationship which is determined after consideration of all the surrounding circumstances.¹⁴⁶

¹³⁴ *SANDU v Minister of Defence* [2007] 9 BLLR 785 (CC) at para 24. See also *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC) at para 42.

¹³⁵ Vettori Stella *The Employment Contract and the Changed World of Work* (2007) at 11.

¹³⁶ Section 200A (a) – (g) of the LRA. If a person's work is subjected to the control or direction of another person; if the extent to which his or her working hours are subject to the control or direction of another person; if a person working for an organisation plays a vital role in such an organisation; if the person has worked for the other person on average no less than 40 hours over the last 3 months; if the person is economically dependent upon the income derived from the employer; if the person is provided with tools of trade or work equipment by the other person; or if such a person works solely for that other person he or she will be presumed to be an 'employee'.

¹³⁷ Section 200A of the LRA. Grogan *Workplace Law* (2009) at 16 – 17.

¹³⁸ Section 83A of the BCEA.

¹³⁹ Grogan *Employment Rights* (2010) at 24.

¹⁴⁰ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹⁴¹ Unemployment Insurance Act 63 of 2001.

¹⁴² Skills Development Act 97 of 1998.

¹⁴³ Occupational Health and Safety Act 85 of 1993.

¹⁴⁴ 'Code of Good Practice: Who is an Employee?' General Notice 1774 in GG No. 29445 of 1 December 2006.

¹⁴⁵ Grogan *Employment Rights* (2010) at 23.

¹⁴⁶ *Workforce Group (Pty) Ltd v CCMA & others* (2012) 33 ILJ 738 (LC) at paras 5 - 6. See also *State Information Technology Agency (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2234 (LAC) at paras 10 - 16.

Fixed term employees in principle enjoy the same rights as permanent employees. The dismissal protection in the LRA will only apply to fixed term employees that are recognised as employees under the definition, since the provision expressly refers to ‘an employee’.¹⁴⁷ The same test is used to establish the existence of an employment relationship for fixed term employees and permanent employees. However, fixed term contracts can probably more easily be disguised as other types of commercial contracts, making it more probable for employers to evade the legislative protection that fixed term employees in principle should enjoy. In addition, the dismissal protection provided for in the LRA expressly requires the person who relies thereupon to qualify as an ‘employee’ appointed in terms of a ‘fixed term contract’, which is undefined in the legislation.

1.2 The right to fair labour practices

South Africa’s Constitution is exceptional, because it contains the right to fair labour practices as a fundamental right. Malawi, that followed the wording of the South African Constitution, is the only other country that guarantees such a right.¹⁴⁸

Section 23 of the Constitution was designed to ensure the dignity of all workers and to promote principles of social justice, fairness and respect for all.¹⁴⁹ It provides that ‘everyone has the right to fair labour practices’.¹⁵⁰ The term ‘everyone’ follows the wording of s 7(1) of the Constitution which provides that the Bill of Rights enshrines the right ‘of all people in the country.’ This is supportive of a broad scope of application.¹⁵¹ There are no internal limitations to s 23 of the Constitution, save that it applies to an employment relationship or a relationship viewed as ‘akin to an employment relationship’.¹⁵² Therefore, the right to fair labour practices applies even in the absence

¹⁴⁷ See the discussion in Ch 4 under 4.1.2.

¹⁴⁸ Cheadle H ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 29.

¹⁴⁹ See also *NEHAWU v UCT* [2003] 2 BCLR 154 (CC) at paras 33 - 40.

¹⁵⁰ Section 23(1) of the Constitution.

¹⁵¹ Le Roux “The Meaning of ‘Worker’ and the Road Towards Diversification: Reflecting on Discovery, SITA and ‘Kylie’” (2009) 30 *Industrial Law Journal* 49. See also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at para 111 and *‘Kylie’ v CCMA & others* (2010) 31 ILJ 1600 (LAC) at paras 16 & 22.

¹⁵² Vettori Stella *The Employment Contract and the Changed World of Work* (Ashgate Publishers 2007) at 162. See also Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 31 and *SANDU v Minister of Defence* 1999 (20) ILJ 2265 (CC) at paras 28 – 30.

of a contract of employment.¹⁵³ Even if the work that an employee does is illegal he or she has the right to fair labour practices.¹⁵⁴ Therefore, this fundamental right applies to fixed term employees.

The term 'unfair labour practice' is not defined in the Constitution.¹⁵⁵ Unfairness implies a failure to meet an objective standard. It may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or deliberate.¹⁵⁶ In *NEWU v CCMA*¹⁵⁷ the LC considered the ambit of 'fair labour practices' as contemplated in s 23 of the Constitution. It was held that labour practices should be both lawful and fair. What is lawful and fair are also two undefined concepts. The flexibility conferred in the term was, in the court's view, intentional to provide flexibility in order to guarantee equitable protection to both employers and employees.¹⁵⁸

In *Nakin v MEC, Department of Education, Eastern Cape Province & another*¹⁵⁹ it was held that the coherence of labour law jurisprudence is determined by the degree to which it expresses the constitutional right to fair labour practices. Therefore, social justice must remain a precondition for creating a resilient economy. The regulatory framework should provide legal certainty. It should also stub out inequitable practices that are contrary to the constitutional mandate. The interpretation and application of legislation in protection of the right to fair labour practices which encapsulates the right not to be unfairly dismissed, is a constitutional matter.¹⁶⁰ It is the court's duty to safeguard employees who are particularly vulnerable to exploitation because they are inherently economically and socially weaker than their employers.¹⁶¹

¹⁵³ *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) at 1489. See also *Rumbles v Kwa-Bat Marketing* (2003) 24 ILJ 1587 (LC) and *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC) at para 22.

¹⁵⁴ Le Roux "The Meaning of 'Worker' and the Road towards Diversification: Reflecting on Discovery, SITA and 'Kylie'" at 58.

¹⁵⁵ *NEHAWU v University of Cape Town & others* 2003 (3) SA 1 (CC) at 19. See also *Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA) at 219. The word 'fair' is defined in Allen RE *Concise Oxford Dictionary* 9th edn (Clarendon Press Oxford 1991) as 'just, unbiased, equitable.'

¹⁵⁶ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D and Christie S *The Labour Relations Act of 1995: A Comprehensive Guide* 2nd edn (Durban Butterworths 1998) at 443.

¹⁵⁷ *NEWU v CCMA* (2003) 24 ILJ 2335 (LC).

¹⁵⁸ *NEWU v CCMA* (LC) at 2339. See also Brassey M 'Labour Relations' in Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional law of South Africa* (Juta & Co 1999) at 30 – 33.

¹⁵⁹ *Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] All SA 559 (Ck) at para 30.

¹⁶⁰ Borat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' (2010) at 9.

¹⁶¹ *Kylie v CCMA & others* (LAC) at paras 29, 41, 43 & 52.

In *NEHAWU v University of Cape Town*¹⁶² the Constitutional Court noted that the content of the term 'fair labour practice' depends upon the circumstances of a particular case and essentially involves making a value judgment. The court's view was that it is for this reason neither necessary nor desirable to define this concept. The Legislature intended the term to gather meaning through decisions of the Labour Court and the Labour Appeal Court. The Constitutional Court emphasised that s 23(1) was primarily aimed at securing continuation of the employment relationship on terms that are fair to both the employer and the employee.¹⁶³ Herein rests the right of the employer to exercise business prerogative.¹⁶⁴

Employers enjoy the right to organise their work operations in a way which they find most suitable to achieve their operational objectives.¹⁶⁵ Employers are permitted to decide what posts to create and who should be appointed or promoted.¹⁶⁶ Since the Bill of Rights is capable of horizontal application,¹⁶⁷ it necessitates a process of the weighing up of rights by the courts. A balance needs to be struck between protecting the personal interests of employees and employers' right to exercise business prerogative without judicial interference.¹⁶⁸ Currently there is no legislative provision specifically subjecting an employer's hiring and promotion decisions to judicial scrutiny. This prerogative is restricted only in terms of the prohibition against unfair discrimination and subjected by the fundamental right to labour practices.¹⁶⁹

Due to the fact that the right to fair labour practices as contained in the Constitution does not only apply to employees, it is necessary to weigh up the rights of employers

¹⁶² *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) at 110.

¹⁶³ *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) at para 40. See also *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC) at para 21.

¹⁶⁴ *Wood v Nestlé SA (Pty) Ltd* (1996) 17 ILJ 184 (IC) at 185F – I, 189D – F, 190I – 191B & 191D.

¹⁶⁵ Strydom EML 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' (1998) 11 *SA Merc LJ* 40 at 42. See also *George v Liberty Life Association of Africa* (1996) 17 ILJ 571 (IC) at 504.

¹⁶⁶ *Grogan Employment Rights* (2010) at 107.

¹⁶⁷ *NEWU v CCMA* (LC) at 2339.

¹⁶⁸ Achieving fairness in labour relations means balancing the respective interests of employers and employees. See Vettori Stella 'Constructive Dismissal and Repudiation of Contract: What must be proved?' 2011 Vol. 22 (1) 173 at 174 and the reference in note 11. See also *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC) at 1646.

¹⁶⁹ Sections 9(4), 7(2) read with s 9(1) and (2) of the Constitution. See also ss 195 of the LRA and ss 42 - 45 read with s 50(1)(g) and Sch 1 to the EEA.

against the rights of employees. A balance must be struck between the rights of fixed term employees and employers' rights to autonomy and business prerogative.¹⁷⁰

Job security and income security ensure that workers and their dependents have more certainty and security. The protection of job security is however not an absolute protection. Employers should be able to terminate the employment relationship under certain circumstances, while employees should be provided with protection against arbitrary dismissals.¹⁷¹

Presiding officers seem to accept that employers should have freedom to establish workplace rules. An enquiry into the fairness of employer conduct rarely interferes with employers' prerogative.¹⁷² Labour forums will not interfere in management's decisions unless it is proven that an employer acted unreasonably or unfairly.¹⁷³ The intention was that the Legislature could, in terms of the unfair labour practice provision, regulate employer conduct by super-imposing a duty of fairness. The mere existence of discretion does not in itself deprive the CCMA of jurisdiction to scrutinise employer conduct.¹⁷⁴

What must be assessed in such a case is whether or not the court should exercise discretion in favour of the employee in the particular circumstances because of the way in which the employer had exercised its business prerogative.¹⁷⁵ Presiding officers should not have an unfettered discretion to rule that employers' actions are unfair, since this would result in extensive intrusion in the principle of business prerogative.¹⁷⁶

¹⁷⁰ Benjamin Paul & Gruen Carola 'The Regulatory Efficiency of the CCMA: A Statistical Analysis' (2006) at 6 accessed at http://www.commerce.uct.ac.za/Research_Units/DPRU/Employment_Promotion_Program/PDFS/Report_CCMA_Benjamin_Gruen.pdf (12 June 2012). 6. See also *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) at paras 40 – 41.

¹⁷¹ Yemin E 'The Protection of Security of Employment – an International Perspective in Collective Bargaining and Security of Employment in Africa: English Speaking Countries' at 114 - 115.

¹⁷² *Goliath v Medscheme (Pty) Ltd* [1996] 5 BLLR 603 (IC) at para 4.2. *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani & others* (2002) 23 ILJ 761 at 771F - J. See also the dissenting judgment by Conradie in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunson* [2000] 1 BLLR 1 (LAC) at para 71 and Zondo JP's remarks in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 at 1024 and 1029A.

¹⁷³ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ (LAC) at paras 23 - 24. See also *Vereniging van Staatsamptenare obo Badenhorst & Department of Justice* [1998] 3 LLD 425 (CCMA) at 426.

¹⁷⁴ *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at para 45.

¹⁷⁵ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 40.

¹⁷⁶ Grogan *Employment Rights* (2010) at 97.

The courts will scrutinise the process by which employers reach their decisions. Failure to follow policies and procedure could result in the procedure being declared unfair.¹⁷⁷ The scope of the duty to act fairly is dependent on factors including the nature of the decision, the relationship between the persons involved and established procedures and practices.¹⁷⁸

The scope of the constitutional right to fair labour practices is wide enough to encapsulate fixed term employees' right to basic minimum rights and instances outside the auspices of the legislative protection against unfair labour practices as discussed below.¹⁷⁹ The right to fair labour practices as set out in s 23 of the Constitution also encompasses the right not to be unfairly dismissed as that right was enacted to give effect to the constitutional right to fair labour practices.¹⁸⁰

Fixed term employees do enjoy the right to fair labour practices and the right not to be unfairly dismissed. However, there is a differentiation made between fixed term and permanent employees in as far as the unfair dismissal mechanism are concerned. If this differentiation makes it more difficult for fixed term employees than it is for indefinitely appointed employees to enforce their right to fair labour practices then it is clearly a constitutional quagmire that requires appropriate measures to address it.

1.2.1 Unfair labour practice protection in terms of the LRA

The Wiehahn Commission¹⁸¹ first proposed the introduction of the concept 'unfair labour practices' into the LRA.¹⁸² The aim was to cure the lack of fairness in the common law system.¹⁸³ Initially the term 'unfair labour practice' was not clearly defined. Any labour

¹⁷⁷ See for instance *Gordon v Department of Health: KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) at paras 22 – 23 & 29.

¹⁷⁸ *Lloyd & others v McMahon* [1987] 1 All ER 1118 (HL) at 1170F - G.

¹⁷⁹ See the discussion under 2.1.

¹⁸⁰ In *NEHAWU v University of Cape Town & others* [2003] 2 BCLR 154 (CC) at paras 41 – 43 it was held that the right to be protected against unfair dismissal is firmly entrenched in the right to fair labour practices.

¹⁸¹ The 1978 Commission of Enquiry into Labour Legislation appointed under General Notice No. 445 of GG No. 5651 dated 8 July 1977.

¹⁸² Currie & De Waal *The Bill of Rights Handbook* (2005) at 501 - 503.

¹⁸³ At common law a contract of employment could be terminated for any reason and by any means as long as the agreed upon contractual principles were adhered to. See Neethling & Le Roux "Positiefregtelike erkenning van die reg op verdienvermoë of 'the right to exercise a chosen calling'" (1987) 8 *Industrial Law Journal* 719 at 720. See also Cohen Tamara 'When Common Law and Labour Law Collide – Some Problems Arising out of the Termination of Fixed-term Contracts' (2007) 19 *SA Merc LJ* 26 at 27 and *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 37.

practice which, in the Industrial Court's opinion, qualified as unfair fell within the scope of the first statutory intervention.¹⁸⁴ The Industrial Court was provided with vast flexibility to develop the common law.¹⁸⁵ In 1980 a more defined meaning of 'unfair labour practice' was legislated. Four consequences that may arise as a result of an act or an omission were identified as being potential unfair labour practices.¹⁸⁶ This new introduction remained susceptible to different interpretations and did not assist in providing legal certainty.¹⁸⁷ In 1988 the definition of 'unfair labour practice' was amended again.¹⁸⁸ This time a list of specific unfair labour practices were identified. However, the list was not exhaustive. The definition remained open-ended and susceptible to various interpretations. In 1991, the definition was amended once more. This definition described 'unfair labour practice' as any act or omission which has or may have the effect that 'any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby.'¹⁸⁹

The LRA currently provides that an 'unfair labour practice' is any unfair act or omission arising between an employer and employee related to a closed list of circumstances. Section 186(2) of the LRA lists promotion, demotion, probation, training or provision of benefits¹⁹⁰ as matters to which the unfairness should relate. In addition suspension or other disciplinary action short of dismissal,¹⁹¹ failure or refusal to re-instate a former employee¹⁹² and any occupational detriment as a result of an employee making a protected disclosure in terms of the Protected Disclosures Act¹⁹³ would resort under this description.

¹⁸⁴ Section 1(f) of the Industrial Conciliation Amendment Act 94 of 1979. The Industrial Court was established in 1979 and provided jurisdiction to deal with unfair labour practice disputes. In 1995 the Industrial Court was replaced by the CCMA and the Labour Court.

¹⁸⁵ Thompson B & Benjamin P *South African Labour Law* Vol. 1 (Juta Law 2001) A1 - 60. *South African Maritime Safety Authority v McKenzie* [2010] 31 ILJ 529 at para 27.

¹⁸⁶ Section 1(g) of the Industrial Conciliation Act 94 of 1979.

¹⁸⁷ Thompson & Benjamin *South African Labour Law* (2001) A1 - 60.

¹⁸⁸ Section 1(h) of the Labour Relations Amendment Act 83 of 1988.

¹⁸⁹ Section 1 of the Labour Relations Amendment Act 9 of 1991.

¹⁹⁰ Section 186(2)(a) of the LRA.

¹⁹¹ Section 186(2)(b) of the LRA.

¹⁹² Section 186(2)(c) of the LRA.

¹⁹³ Section 186(2)(d) of the LRA and s 4(2) of the Protected Disclosures Act 26 of 2000.

The definition of unfair labour practices does not cover all incidents that could prevail in the employment relationship.¹⁹⁴ It is therefore conceivable that circumstances arising in a fixed term employment relationship, at times, would fall outside of the statutory definition. Fixed term employees are covered by this right just as much as permanent employees are. However, it may be more difficult for a fixed term employee to prove that an unfair labour practice had occurred. Employees are often appointed without contracts that specifically include provisions that would entitle them to the rights to which these unfair labour practices relate.¹⁹⁵

1.2.2 Protection against unfair dismissal

The LRA provides that 'every employee has the right not to be unfairly dismissed.'¹⁹⁶ This provision is the underpinning of all the sections in the LRA that follow thereupon.¹⁹⁷

The essence of the doctrine of unfair dismissal is to protect the employee against dismissal without fair substantive grounds and adherence to a fair procedure.¹⁹⁸ But, employers employing fixed term employees are usually not subjected to the same onerous duties and obligations imposed by the LRA. Fixed term employees often enjoy less job security than permanent employees.¹⁹⁹

The ordinary definition of dismissal is contained in s 186(1)(a) of the LRA. In terms of this provision, an employer who terminated a contract of employment with or without notice would have dismissed an employee. In effect, any act or omission by an employer which leads to the termination of an employee's employment would constitute

¹⁹⁴ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 42.

¹⁹⁵ A contract of employment may be concluded in writing, orally or even tacitly. There are no formalities required in legislation. Section 29 of the BCEA only requires written particulars, not a written employment contract. In case of a fixed term employment contract s 29(1)(m) of the BCEA determines that such particulars should include the termination date of the appointment.

¹⁹⁶ Section 185(a) of the LRA.

¹⁹⁷ Brasseley Martin *Commentary on the Labour Relations Act* Vol. 3 (Juta 1999) at A8:1. See also *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at para 42 and *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at paras 72 & 74.

¹⁹⁸ *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA) at paras 2 & 9.

¹⁹⁹ The relatively unprotected status of fixed term employees makes them particularly vulnerable when employers consider restructuring. This risk of job loss is increased by the principle 'last in first out' since they are usually appointed for a brief period only. Section 189(7) of the LRA and Item 12(9) of the Code of Good Practice: Dismissal both identify length of service as an important factor to consider when retrenchment is contemplated.

a dismissal.²⁰⁰ In *Ouwehand v Hout Bay Fishing Industries*²⁰¹ and in *National Union of Leather Workers v Barnard NO & another*²⁰² it was held that an employee who alleges that an unfair dismissal within the meaning of s 186(1)(a) of the LRA occurred must show that some overt act by the employer was the 'sole or proximate cause' of the termination of employment.²⁰³ If a contract of employment comes to an end, for example, through the death of the employee, it would not amount to dismissal, because the proximate cause of the termination would not have been an act of the employer.

Section 186(1)(a) of the LRA is probably adequate to cover the situation where a fixed term employee's claim is based on the fact that he or she had a reasonable expectation that the employment would continue. The proximate cause of the employment ceasing is an act by the employer (the creation of an expectation of renewal) and an accompanying omission (failure to renew the contract).²⁰⁴ Grogan seems to support this premise. He opines that, if a fixed term employee is permitted to continue working after the termination date agreed upon in the agreement, the contract would be tacitly renewed on the same terms, but indefinitely. In these circumstances the contract will have to be terminated either by means of an ordinary dismissal or by resignation.²⁰⁵

But, fixed term employees are regulated under a different unfair dismissal provision.²⁰⁶ Section 186(1)(b) of the LRA has been described as part of the protective fabric related to the unfair dismissal provisions falling outside of the ordinary meaning of dismissal.²⁰⁷ It is one of only two provisions in the LRA that specifically deals with the termination of a fixed term contract.²⁰⁸

²⁰⁰ *Mampeule v SA Post Office* LAC Case no. JA29/09 (unreported) at para 12.

²⁰¹ *Ouwehand v Hout Bay Fishing Industries* (2004) 25 ILJ 731 (LC) at para 15.

²⁰² *National Union of Leather Workers v Barnard NO & another* (2001) 22 ILJ 2290 (LAC) at para 21.

²⁰³ This also seems to be the stance taken as far as fixed term employees are concerned. See for instance *Chilwane v Carlbank Mining Contractors* (JS 11/2010) [2010] ZALC 120 at para 15.

²⁰⁴ *Sindane v Prestige Cleaning Service* (2010) 31 ILJ 711 (LC) at 740.

²⁰⁵ *Grogan Dismissal* (2010) at 35. See also *NEHAWU obo TATI and SA Local Government Association* (2008) 29 ILJ 1777 (CCMA) at 1783 - 1784.

²⁰⁶ Section 186(1)(b) of the LRA.

²⁰⁷ The common law concept of dismissal is extended to protect fixed term employees who are capable of proving the existence of a reasonable expectation of renewal. *Grogan Workplace Law* (2010) at 107 - 108. See also *Fedlife Assurance Ltd v Wolfaardt* (2002) 22 ILJ 2407 (SCA) at paras 58 - 59 and *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) at 740 and note 3 thereof.

²⁰⁸ The other provision, s 191 of the LRA, deals with determining the date of a dismissal. This is discussed further in Ch 4 under 1.1.

The LRA provides that, should an employer create a legitimate expectation that a fixed term contract of employment will be renewed on the same or similar terms, and the employer fails to affect such a renewal on the same or similar terms or at all, the non-renewal would constitute a dismissal.²⁰⁹

An unfair dismissal claim under s 186 of the LRA, if combined with a claim for unfair discrimination in terms of the EEA, could amount to an automatically unfair dismissal. The LRA provides that a dismissal would be automatically unfair if the employer, either directly or indirectly, discriminated unfairly against an employee in dismissing him or her. A number of grounds are listed in the section, but the list is not exhaustive. If a dismissal is connected to a fixed term employee's 'race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility' or any other ground that is considered arbitrary by the court, it would qualify as an automatically unfair dismissal.²¹⁰

Fixed term employees enjoy the same protection as permanent employees under the unfair dismissal provisions. However, a legislative differentiation is impugned by the inclusion of a stipulation applicable exclusively to fixed term employees. If accessing social justice by means of the mechanism that specifically applies to fixed term employees is more difficult for them than it is for permanent employees to access social justice, the rationale for making this differentiation becomes questionable.

1.2.3 The right to freedom of association

The right to freedom of association and organisational rights is contained in the Bill of Rights.²¹¹ All employees enjoy the right to join a trade union and to participate in its activities.²¹² The LRA also declares that employees enjoy the right to freely associate by joining trade unions and federations of their choice and participating in their lawful activities.²¹³

²⁰⁹ Section 186(1)(b) of the LRA.

²¹⁰ Section 187(1)(f) of the LRA.

²¹¹ Section 23(2) - (4) of the Constitution is situated in Ch 2 thereof.

²¹² Currie & De Waal *The Bill of Rights Handbook* (2005) at 507.

²¹³ Section 4 of the LRA.

An employer and a registered trade union, whose members form a majority of the employer's employees in the workplace or the parties to a bargaining council, may conclude a collective agreement in which a threshold of representativeness is established for purposes of eligibility to organisational rights.²¹⁴ Registered trade unions who are sufficiently representative can apply for access to organisational rights.²¹⁵ The constitutional right to fair labour practices dictates that collective bargaining should be extended to all forms of work.²¹⁶ Labour market policy is aimed particularly at the promotion of collective bargaining and the protection of the marginalised.²¹⁷ Therefore, the right to freedom of association is not intrinsically limited to cover indefinitely appointed employees only.

Outsourcing, labour broking and subcontracting all have the effect of relocating employers' obligations to others.²¹⁸ This undermines participation in trade unions and the effectiveness of collective bargaining. Some fixed term employees' employment may be of such a precarious nature that they become 'invisible for recruitment into trade unions.'²¹⁹ It is difficult for trade unions to recruit temporary workers and to retain them because they are unable to pay the membership fees during periods of non-placement. Unions are also less inclined to represent these workers and to bargain on their behalf.²²⁰ Consequently, fixed term employees are often under-represented in trade unions. Due to the fact that fixed term employees often do not enjoy the coverage of unions, they are often not covered by collective agreements pertaining to salary increases and sectoral agreements concerning minimum wages.²²¹ Due to the fact that fixed term employees often fall outside the regulatory net of traditional labour law, there should be regulation specifically for their protection.²²²

²¹⁴ Section 18(1) of the LRA.

²¹⁵ Section 12 of the LRA allows sufficiently representative trade unions to access the workplace, recruit members and serve the interest of the union's members.

²¹⁶ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 131.

²¹⁷ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 98.

²¹⁸ 'Outsourcing' means hiring outside contractors to take over mostly non-core functions of an enterprise rather than employing permanent personnel. Bosch Craig 'Transfers of Contracts of Employment in the Outsourcing Context' (2001) 22 *Industrial Law Journal* 840 at 840.

²¹⁹ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 127.

²²⁰ RIA of 2010 at 48.

²²¹ RIA of 2010 at 50.

²²² Vettori *The Employment Contract and the Changed World of Work* (2007) at 161. See also Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 125.

The resolution of interest disputes is secured ultimately by the exercise of the right to strike.²²³ Strikes play an incremental role in securing agreements regarding conditions of employment.²²⁴ The fact that fixed term employees are often not members of trade unions has the effect of minimising both the availability of this important measure to them and also the efficiency of collective bargaining mechanisms. Fixed term employees who are paid an hourly wage would also be less inclined to participate in strikes. Especially fixed term employees who wish to gain access to permanent employment in future or to have their fixed term contracts renewed, would probably not risk participating in industrial action.

1.2.4 Basic employment conditions

Minimum conditions of employment are set to protect employees against abuse. In South Africa legislation has been enacted to regulate hours of work, leave, termination of employment and health and safety in the workplace.²²⁵

Although there is no constitutional right that expressly provides for setting of basic conditions of employment, the setting of minimum rights to avoid exploitation would logically resort under the right to fair labour practices.²²⁶

The first piece of South African legislation introduced to set minimum conditions of employment did not cover the entire South African labour force.²²⁷ Public servants, agricultural workers and domestic workers were initially excluded.²²⁸ The BCEA was legislated to conform to international standards. It is now made applicable to most employees.²²⁹

There is no legislation in South Africa requiring that a contract of employment must be concluded in writing. The BCEA obliges employers to provide employees with brief written particulars of their appointment.²³⁰ For fixed term employees, the requirement is

²²³ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 106.

²²⁴ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 104.

²²⁵ Benjamin Paul 'Labour Market Regulation: International and South African Perspectives' (2005) at 3.

²²⁶ Section 23 of the Constitution.

²²⁷ Basic Conditions of Employment Act 3 of 1983.

²²⁸ Section 1(2) and 1 (3) of the Basic Conditions of Employment Act 3 of 1983.

²²⁹ Grogan *Employment Rights* (Juta 2010) at 3.

²³⁰ Section 29(1) of the BCEA.

that these written particulars must indicate the date upon which the employment will terminate.²³¹ Employers often do not comply with this legislative requirement.²³² Nevertheless, even in the absence of a particular provision, the BCEA provides protection to most employees.

Fixed term employees generally qualify for paid annual leave, paid sick leave and paid public holidays.²³³ Those who are not expressly excluded from the provisions of the BCEA all enjoy the right to at least 21 days' annual leave per twelve month cycle on full pay. To calculate leave for persons who are not full-time employees, the BCEA provides that the parties may agree to one day for every seventeen days worked or one hour for every seventeen hours worked. Fixed term employees are entitled to one day's sick leave for every 26 days worked during the first four months of their employment. After the four month period, sick leave is calculated as the number of days that they would usually work in six weeks to be taken over a three year period.²³⁴

An employee who has worked continuously for longer than four months is entitled to family responsibility leave. This entitlement may only be varied by collective agreement.²³⁵ In terms of s 25 of the BCEA, four consecutive months' unpaid maternity leave is available to female employees, whether they are appointed permanently or temporarily. The maternity leave must commence from four weeks before the birth and continue until such time as it is safe to return to work.²³⁶

Fixed term employees in South Africa, despite being covered by the BCEA, often forfeit their leave entitlements. Fixed term employees who are paid an hourly rate for work done could, for instance, forfeit payment that they would otherwise be entitled to.

Employers also do not all comply with their legislated responsibilities as they should. In 2012 only about 69 percent of all employees in South Africa received paid sick leave while only approximately 66.7 percent were afforded paid holiday leave.²³⁷

²³¹ Section 29(1)(m) of the BCEA.

²³² RIA of 2010 at 64.

²³³ Sections 20(b) and s 22(3) of the BCEA.

²³⁴ Section 22 of the BCEA.

²³⁵ Section 27 of the BCEA. Grogan *Employment Rights* (2010) at 83.

²³⁶ Section 25(2) and (3) of the BCEA.

²³⁷ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2012' at xii. Accessed at http://www.statssa.gov.za/inside_statssa/vacancies.asp (12 March 2013).

Upon termination of employment, an employee is entitled to claim accrued leave that he or she had not taken for the current cycle and the previous cycle only.²³⁸ As long as an employee works, he or she is entitled to receive payment for his or her services. Employees, who would ordinarily be expected to work on a specific day, had it not been a public holiday, are entitled to full pay even though they are not required to work.²³⁹ Fixed term employees who are dismissed, but who received payment in kind consisting of housing, are entitled to remain in occupation until such time as a dispute regarding the fairness of the dismissal is finalised.²⁴⁰ Only non-performance by employees, other than times in which an employee cannot reasonably be expected to work, entitles an employer to withhold the employee's remuneration.²⁴¹ Employees who are suspended are usually entitled to their full remuneration despite the fact that they are not working.²⁴² But, some fixed term employees are paid an hourly rate for actual time worked. Unless it is specifically contracted between the parties, such fixed term employees would not be able to claim payment for days worked on public holidays or if they are absent from work for a legitimate reason.

All employees, including fixed term employees, are entitled to reasonable notice of termination of their employment in terms of the BCEA.²⁴³ Notice of termination must be given in writing and explained orally to illiterate employees.²⁴⁴ In the first six months of employment, an employee is entitled to at least a week's notice. During the second six month period, an employer must provide a minimum of two weeks' notice. After the first year, an employee becomes entitled to at least a month's notice.²⁴⁵ However, it is well accepted that in the absence of a stipulation dealing with a notice period for

²³⁸ Section 20(11) read with s 40(b) and (c) of the BCEA. In *Jooste v Kohler Packaging Ltd* (2004) 25 ILJ 121 (LC) at paras 3.5 - 3.6 Franklin AJ pointed out that the purpose of the BCEA was to allow employees leave and not for them to accumulate leave to get the monetary pay out upon resignation, hence the restriction.

²³⁹ *Grogan Employment Rights* (2010) at 84.

²⁴⁰ Section 8 of the Extension of Security of Tenure Act 62 of 1997. This right is subject thereto that the employee may not receive remuneration during the time after dismissal. *Lebowa Platinum Mines Ltd v Viljoen* (2009) 30 ILJ 1742 (SCA) at para 18.

²⁴¹ This is for instance on public holidays, after hours, or if the employee is ill. *Grogan Employment Rights* (2010) at 76.

²⁴² Unless legislation provides that an employer is absolved from paying remuneration during a period of suspension, an employer is obliged to continue paying its employees. *Grogan Employment Rights* (2010) at 133. See for instance generally *Singh v SA Rail Commuter Corporation t/a Metrorail* (2007) 28 ILJ 2067 (LC) and *Sappi Forests (Pty) Ltd v CCMA & others* (2009) 30 ILJ 1140 (LC) at paras 8 - 16.

²⁴³ Section 37 of the BCEA.

²⁴⁴ Section 37(4) of the BCEA.

²⁴⁵ Section 37(1) of the BCEA. *Grogan Employment Rights* (2010) at 34.

termination,²⁴⁶ an employer can rely on the termination date agreed upon in a fixed term contract, without giving notice as required under the BCEA.²⁴⁷ However, an employer would be compelled to provide notice in terms of the BCEA should a renewable fixed term contract not be renewed. The notice period for fixed term employees employed for longer than a year who are bound by collective agreements may be reduced to two weeks.²⁴⁸ It is possible in term of the legislation to pay an employee in lieu of notice.²⁴⁹

If a fixed term employee, who has been working for an employer for longer than a year, is dismissed for operational reasons,²⁵⁰ he or she is entitled to severance pay to the amount of one week's remuneration for each completed year of service.²⁵¹ If an employee however refuses reasonable alternative employment which was offered to him or her by the employer, he or she will forfeit such severance pay.²⁵² The LRA also contains a similar provision that determines that if an employee is dismissed for operational reasons he or she will usually be entitled to one week's severance pay for every completed year that he or she had worked for the employer. It is expressly stated in this provision that severance pay is additional to any other payment to which an employee is entitled.²⁵³

If a contract of employment is silent on a matter concerning conditions of employment, the BCEA's provision is incorporated into the contract. The provisions of the BCEA enjoy preference over individual contracts of employment, unless the provisions

²⁴⁶ It is possible to include a notice period in a fixed term contract. Grogan calls such an agreement a 'maximum duration contract'. Grogan *Employment Rights* (2010) at 62 – 64. See also *Mafihla v Govan Mbeki Municipality* [2005] 4 BLLR 334 (LC) at para 37.

²⁴⁷ Gericke 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment' at 12.

²⁴⁸ Section 37(2) of the BCEA.

²⁴⁹ Section 38 of the BCEA.

²⁵⁰ Section 213 of the LRA defines 'operational requirements' as the needs of employers based on 'economic, technological, structural or similar' reasons.

²⁵¹ Section 41 of the BCEA. This rate may be adjusted by the Minister from time to time after consultation with NEDLAC and the Public Service Co-ordinating Bargaining Council. Contracts of employment and collective agreements may provide for higher levels of redundancy pay.

²⁵² Section 41(4) of the BCEA determines that an employee who unreasonably refuses an offer of alternative employment forfeits his or her right to severance pay. See also item 11 of the Code of Good Practice: Dismissal based on Operational Requirements. The reasonableness of a refusal is determined by a consideration of the reasonableness of the offer of alternative employment. Objective factors such as remuneration, status and job security and the employee's personal circumstances are taken into account.

²⁵³ Section 196 of the LRA. An employee would not be entitled to a severance payment despite the fact that he or she is dismissed for operational reasons if the employer is exempted from paying severance pay or if the employer had offered the employee reasonable alternative employment which he or she had unreasonably refused.

contained in the individual contracts are more favourable to the fixed term employee.²⁵⁴ Provisions included in a contract of employment which renders the employee worse off than the BCEA's provisions, are of no legal force.²⁵⁵

It is impermissible for employers and employees to contract out of the BCEA. In other words, the minimum conditions as set by the BCEA are implied contractual terms that are enforceable despite stipulations included in the contract on less favourable terms. The provisions contained in the BCEA may be altered through collective agreements, but only to the extent that such collective agreements comply with the BCEA.²⁵⁶

Fixed term employees hoping to eventually secure permanent employment with the employer would logically be less inclined to enforce the provisions in the BCEA. The courts do not enforce the right to notice as contained in the BCEA, or the severance pay provisions in as far as fixed term employees are concerned. Despite the fact that fixed term employees enjoy the same rights under the BCEA, in practice they are often denied these rights.

1.2.5 The right to refer a dispute for resolution

The Constitution provides that every South African citizen has the right to have disputes heard and resolved by an unbiased forum or court.²⁵⁷ The LRA aims to promote social justice.²⁵⁸ Therefore, it is essential to recognise a right to recourse.²⁵⁹ One of the express aims of the LRA is to establish simple procedures for dispute resolution.²⁶⁰

The rights contained in the Bill of Rights²⁶¹ are enforceable. Anybody acting in the interest of a group or class of persons or in the public interest and associations acting in

²⁵⁴ Section 4 of the BCEA. See also *SA Maritime Safety Authority v McKenzie* [2010] ZASCA 2 at para 24.

²⁵⁵ Section 4(c) of the BCEA. See also *De Beer v SA Export Connection CC t/a Global Paws* (2008) 29 ILJ 347 (LC) at paras 20 - 21.

²⁵⁶ Section 5 of the BCEA.

²⁵⁷ Section 34 of the Constitution.

²⁵⁸ Section 1 of the LRA. See also *Chillibush Communications (Pty) Ltd v Gericke and others* (2010) 31 ILJ 1350 (LC) at para 19.

²⁵⁹ *Simon Nape and INTCS Corporate Solutions (Pty) Ltd* Labour Court Case No. JR617/07 at para 81.

²⁶⁰ See the preamble to the LRA. See also the Explanatory Memorandum to the Draft Labour Relations Bill of 1995 at 43.

²⁶¹ Chapter 2 of the Constitution.

the interest of the members may approach a competent court to enforce their constitutional rights.²⁶²

Fixed term employees who do not enjoy the protection provided by the LRA or the common law could refer a dispute in terms of s 23(1) of the Constitution.²⁶³ There have been cases in which the Constitutional Court has held that an unfair dismissal qualified as an unfair labour practice in terms of s 23 of the Constitution.²⁶⁴ Although these cases did not involve fixed term contracts, it is in principle conceivable that a fixed term employee who has no recourse to statutory or common law remedies for unfair dismissal could refer his or her claim to the Constitutional Court for adjudication.

To date there has not been a Constitutional Court case dealing specifically with an employer's failure to renew a fixed term contract. However, some cases have been referred regarding the payment of severance pay upon termination of a fixed term contract for operational reasons. A failure by an employer to pay a fixed term employee the same severance pay as other employees has also been held to constitute an infringement on the right to fair labour practices.²⁶⁵

The Constitution does not provide for specific remedies for a breach of the right to fair labour practices under s 23. The Constitutional Court would most likely apply the LRA's remedies²⁶⁶ despite the Constitutional mandate that the Constitutional Court may fashion appropriate and effective relief.²⁶⁷

The Constitution also requires that mechanisms used in the resolution of labour disputes must be effective. In other words, if legislation is enacted that limits the right to

²⁶² Section 38 of the Constitution.

²⁶³ Vettori Stella *The Employment Contract and the Changed World of Work* (Ashgate Publishers 2007) at 161.

²⁶⁴ See for instance *Gotso v Afrox Oxygen Ltd* [2003] 6 BLLR 605 and *Ndara v The Administrator University of Transkei* Case no. 48 of 2001 (Tk)(Unreported).

²⁶⁵ See for instance *Matthews v GlaxoSmithKline SA (Pty) Ltd* [2007] 3 BLLR 230 (LC) at paras 69 - 71.

²⁶⁶ In case of private conduct remedies will usually be found in the ordinary legislation (the LRA) or the common law, whereas if the law itself is challenged constitutional remedies may be fashioned. See Currie & De Waal *The Bill of Rights Handbook* (2005) at 194.

²⁶⁷ Section 38 of the Constitution. In *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) at para 19 it was held that s 38 of the Constitution is aimed at providing flexibility in the remedies that may be provided under the Constitution. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras 65 & 81 - 82. In *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para 50 the court stated that the remedy should be aimed at placing the person in the position he or she would have been in if the infringement had not taken place. At para 52 the court stated that depending on the facts of each matter it would also be 'appropriate relief' to provide a remedy which sends out a clear message that discrimination will not be tolerated.

access a forum for resolution of a dispute it must be warranted under the limitation clause.²⁶⁸

1.2.6 The right to social security

The Constitution entrenches the right to access social security for those who are incapable of supporting themselves and/ or their dependents.²⁶⁹ In terms of the Constitution the South African government is obliged to progressively realise the socio-economic rights to basic health care, food and water and social security within its available resources.²⁷⁰

The right to social security is given effect to through the Compensation for Occupational Injuries and Diseases Act²⁷¹ or Mine Health and Safety Act²⁷² where appropriate,²⁷³ the Unemployment Insurance Act²⁷⁴ and the Social Assistance Act.²⁷⁵

In 1999 Olivier identified a number of deficiencies in the South African social security system.²⁷⁶ One of them was that workers who are temporarily, informally or atypically employed are to a large extent excluded from South Africa's social security system. Fixed term employees would fall in these categories.²⁷⁷ The rights conveyed by the different pieces of social security legislation and the practicality of the protection provided to fixed term employees is considered briefly below.

²⁶⁸ Section 34 of the Constitution.

²⁶⁹ Section 27(1)(c) of the Constitution.

²⁷⁰ Section 27(2) of the Constitution. See also Marius Olivier 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199.

²⁷¹ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

²⁷² Mine Health and Safety Act 29 of 1996.

²⁷³ Section 1(3) of the Occupational Health and Safety Act determines that this piece of legislation does not apply to employers and workplaces to which the Mine Health and Safety Act 29 of 1996 or certain matters that are covered by the Merchant Shipping Act 57 of 1951 apply. Section 103 of the Mine Health and Safety Act 29 of 1996 determines that the Occupational Health and Safety Act will not be applicable to any matter in respect of which any provision of the Mine Health and Safety Act applies.

²⁷⁴ Unemployment Insurance Act 63 of 2001.

²⁷⁵ Social Assistance Act 13 of 2004.

²⁷⁶ The deficiencies that are identified by the author, but that is not discussed herein due to the fact that they are not of direct relevance, are those related to the marginalization and exclusion from legislative protection of unemployed persons, the self-employed, the rural poor, aged persons and non-citizens. In this regard see Olivier Marius 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199 *et seq.*

1.2.6.1 The right to safe and healthy working conditions

The Constitution stipulates that everyone is entitled to an environment which is safe and healthy.²⁷⁸ The State is obliged to enact legislation and see to it that measures are implemented to ensure that employees are not exposed to an environment which is hazardous to their health.²⁷⁹

Although also regulated under common law,²⁸⁰ South Africa has enacted a comprehensive network of occupational health and safety rules to provide protection to workers. The two main pieces of legislation are the Occupational Health and Safety Act²⁸¹ and the Mine Health and Safety Act.²⁸²

A mine must, for as far as it is reasonably possible, be designed, built and equipped in a fashion which makes working there safe.²⁸³ In addition, the manager should in as far as it is reasonable to expect it, ensure that the mine functions in a way which does not endanger the health and safety of employees or any other person in the performance of their duties.²⁸⁴

In as far as it is reasonably practicable,²⁸⁵ managers must ensure that the working environment in mines and works is and remains risk-free to employees' health and safety.²⁸⁶ In other workplaces²⁸⁷ employers are likewise obliged to ensure that the workplace is safe and without risk to the health and safety of employees for as far as it is reasonably practicable.²⁸⁸ Certain specific obligations are placed upon employers to ensure health and safety including the provision and maintenance of systems of work,

²⁷⁷ Olivier Marius 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199 at 2200.

²⁷⁸ Section 24 of the Constitution.

²⁷⁹ Section 24(b) of the Constitution. See also *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at para 78.

²⁸⁰ Contractual, delictual and criminal liability is still regulated at common-law.

²⁸¹ Occupational Health and Safety Act 85 of 1993.

²⁸² Mine Health and Safety Act 29 of 1996.

²⁸³ Section 2(1)(a) of the Mine Health and Safety Act 29 of 1996.

²⁸⁴ Section 2(1)(b) of the Mine Health and Safety Act 29 of 1996.

²⁸⁵ Section 102 of the Mine Health and Safety Act 29 of 1996 defines the term 'reasonably practicable'. In terms of this definition, how severe and big the hazard or risk in question is, the extent in which knowledge is available on this type of risk and about how to decrease the risk, the cost of removal or mitigation of the risk as well as the benefits attached to such removal are to be considered in determining whether or not it is reasonably practicable. The term 'reasonably practicable' is defined in s 1 of the Occupational Health and Safety Act 85 of 1993 in a similar fashion.

²⁸⁶ Section 5(1) of the Mine Health and Safety Act 29 of 1996.

²⁸⁷ The Mine Health and Safety Act 29 of 1996 is applied in mines and works and the Occupational Health and Safety Act 85 of 1993 in most other workplaces.

²⁸⁸ Section 8(1) of the Occupational Health and Safety Act 85 of 1993.

plant and machinery that, in as far as is reasonably practicable, does not expose employees to risks to their health or safety; the performance of appropriate risk assessments; the provision of information, instruction, training as well as supervision.²⁸⁹

Employees also have certain duties under the Occupational Health and Safety Act.²⁹⁰ They are required to take reasonable care so as to ensure that he or she or others are not exposed to health and safety risks as a result of his or her conduct in the performance of services.²⁹¹ In addition, employees are required to co-operate with those obligated with duties under the Health and Safety Act in order to make compliance possible.²⁹² Employees are further required to follow all reasonable instructions and follow health and safety rules applicable in the workplace.²⁹³ Employees also have a reporting duty. They are required, as soon as possible, to report any potential risks to health and safety that they become aware of,²⁹⁴ as well as any incidents that occurred while they were working.²⁹⁵

In terms of the common law, employers are also required to take care of their employees' safety.²⁹⁶ This duty is not an absolute one.²⁹⁷ It is restricted by what is considered to be reasonable. The standard of the 'reasonable man' is used.²⁹⁸ Employers do not have to take precautions that are viewed as extraordinary in order to prevent injury to employees.²⁹⁹ Employers are only required to protect employees against accidents that are foreseeable or likely to happen.³⁰⁰

According to a 2008 ILO Report there are about 337 million accidents annually in the workplace. Approximately two million people suffer from work-related diseases yearly. Fatalities number at 2.3 million per annum of which 650 000 involve hazardous

²⁸⁹ Section 8(2) of the Occupational Health and Safety Act 85 of 1993.

²⁹⁰ Section 14 of the Occupational Health and Safety Act 85 of 1993. Section 22 of the Mine and Health and Safety Act 29 of 1996 contains similar provisions relating to work performed in mines.

²⁹¹ Section 14(a) of the Occupational Health and Safety Act 85 of 1993.

²⁹² Section 14(b) of the Occupational Health and Safety Act 85 of 1993.

²⁹³ Section 14(c) of the Occupational Health and Safety Act 85 of 1993.

²⁹⁴ Section 14(d) of the Occupational Health and Safety Act 85 of 1993.

²⁹⁵ Section 14(e) of the Occupational Health and Safety Act 85 of 1993.

²⁹⁶ *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T) at 31B – G.

²⁹⁷ See for instance *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 T.

²⁹⁸ *S v Mbombela* 1933 AD 269 at 273 and *S v Burger* 1975 (4) SA 877 (A) at 879D. See also *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (AD) at 373F and *Rampal and another v Brett, Wills and Partners* 1981 (4) SA 360 (D) at 370A.

²⁹⁹ *Barker v Union Government* 1930 TPD 120 at 128.

³⁰⁰ *MacDonald v General Motors South Africa (Pty) Ltd* 1973 (1) SA 232 (E) at 236 and 237F – 238A.

substances.³⁰¹ The Occupational Health and Safety Act³⁰² were enacted in order to provide protection against occupational-related injuries, diseases and deaths. It covers all employees³⁰³ and members of the general public who enter the work premises.³⁰⁴ The purpose is '[t]o provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work.'³⁰⁵

The Occupational Health and Safety Act³⁰⁶ requires employers, in as far as it is reasonably practicable, to provide employees with information and training on how to perform their duties safely and without risk to their health and to eliminate and manage risks.³⁰⁷ This is where the main problem in respect of fixed term employees originates. The workplace has been segmented between employees in full-time employment and those in atypical employment.³⁰⁸ This polarity between standard and non-standard employees has negated the effectiveness of health and safety training.³⁰⁹ Fixed term work is recognised as one of the forms of 'contingent work'. In a 2010 study, the core concepts that were identified in relation to these types of workers were: low reciprocity, uncertainty, discontinuity and marginality. This obviously does not have a positive impact on communication of health and safety standards.³¹⁰ Consequently fixed term employees often do not receive the required training in order to ensure safety at work.³¹¹

³⁰¹ World of Work 'Promoting Safe and Healthy Jobs: The ILO Global Programme on Safety, Health and the Environment (SafeWork)' No. 63 (August 2008) at 4. Accessed at http://www.ilo.org/wow/PrintEditions/lang-en/docName-WCMS_099048/index.htm (12 March 2013).

³⁰² Occupational Health and Safety Act 85 of 1993.

³⁰³ In s 1 'employee' is defined as 'any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person'.

³⁰⁴ Section 9 of the Occupational Health and Safety Act 85 of 1993.

³⁰⁵ Preamble to the Occupational Health and Safety Act 85 of 1993.

³⁰⁶ Amuedo-Dorantes C 'Work transition into and out of involuntary employment in a segmented market: Evidence from Spain' *Industrial and Labour Relations Review* Vol. 53 (2) 309 at 309 – 310.

³⁰⁷ Section 8 of the Occupational Health and Safety Act 85 of 1993.

³⁰⁸ A segmented labour market is divided into a primary and secondary sector. The primary sector offers better working conditions, job security and opportunity for advancement. On the other hand the secondary sector constitutes one in which people are appointed temporarily, often against their preference and a significant number of these employees become trapped in this labour sector.

³⁰⁹ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 128.

³¹⁰ Facey Marcia E & Eakin Joan M 'Contingent work and ill-health: Conceptualizing the links' *Social Theory & Health* (2010) at 326.

³¹¹ Migrant workers who perform seasonal work are particularly vulnerable. Charlton John 'Migrant worker at risk because of poor health and safety training warns watchdog' accessed at

The Compensation for Occupational Injuries and Diseases Act³¹² (COIDA) requires that most employers, whether they employ persons indefinitely and/or temporarily, contribute to a compensation fund to provide for potential health and safety claims.³¹³ Fixed term employees or their dependants can claim relief for occupational-related injuries, illness or death.³¹⁴ Compensation can only be claimed if the accident which caused the injury, illness or death occurred within the scope of the employee's employment and was not predictable. No payments are made in respect of temporary disabilities of three days or less. If an employee is involved in any incident which may affect his or her health or which has caused an injury to him or herself, he or she must report the incident to the employer, or to anyone authorised thereto by the employer, or to his health and safety representative, as soon as practicable but no later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was impossible.³¹⁵ Fixed term employees would be entitled to claim compensation if they got hurt while working just like permanent employees could.

Despite the enabling legislation and policy environment for protection of workers, there is still a high incidence of occupational injuries and fatalities. Policies and the enforcement by government departments are fragmented. Government departments responsible for monitoring and enforcement of the labour policies are overloaded with work³¹⁶ and the competencies and efficiency of the compensation fund is weak.³¹⁷

Fixed term employees have the same rights as permanent employees in as far as the provision of safe working conditions is concerned. However, since fixed term employees usually work for short periods and they are often not provided with the same training and information, they are more exposed to risks associated with health and safety. Informalisation of the workplace exposes these employees more to health and safety risks.

<http://www.personneltoday.com/articles/2008/02/19/44498/migrant-workers-at-risk-because-of-poor-health-and-safety-training-warns.html> (3 October 2013).

³¹² Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

³¹³ Section 86 of the COIDA. It should be noted that certain groups of employees are in s 1 of the COIDA excluded from the operation of the legislation and their employers consequently are not obliged to make such payments. These employees include those working for the state performing military service, members of the police force, self-employed persons and domestic employees employed in private households.

³¹⁴ Section 22(1) of the COIDA.

³¹⁵ Section 14 of the Occupational Health and Safety Act 85 of 1993.

³¹⁶ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 25.

1.2.6.2 Unemployment Insurance

The Unemployment Insurance Act³¹⁸ was enacted to provide for the payment of unemployment benefits to employees under certain circumstances. Employers are required to register all employees for unemployment insurance.³¹⁹ Employers and employees are both required to contribute one percent of all employees' wages.³²⁰ Certain events including illness, maternity, absence resulting from adoption of children and unemployment are specified that would trigger eligibility for payment to registered employees.³²¹ Fixed term employees are expressly provided with a right to claim unemployment benefits if their contracts are terminated.³²² Before a claim is possible, there must have been an interruption in employment of at least fourteen days.³²³ In addition, the required contributions must have been paid.³²⁴

If an employee becomes unemployed, he or she will receive limited benefits.³²⁵ Eligible employees can claim one day's unemployment benefits for every six days worked.³²⁶ The amount of the benefit claimable is calculated according to a formula.³²⁷ A maximum is set in respect of claims for unemployment benefits: No more than 238 days (34 weeks' benefits) are claimable. In order to benefit vulnerable workers, the percentage of the employees' salary that is claimable depreciates in relation to the amount of income he or she received while working. In other words, unemployed persons who used to receive a higher salary would receive less benefits percentage wise than those who received a low income when they were working.³²⁸ South Africa, in comparative terms, contributes very little in respect of unemployment insurance.³²⁹ Fixed term employees

³¹⁷ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 31.

³¹⁸ Unemployment Insurance Act 63 of 2001.

³¹⁹ Section 4 of the Unemployment Insurance Act 63 of 2001 establishes a fund to which employers and employees contribute.

³²⁰ Section 5 read with s 8 of the Unemployment Contribution Act 4 of 2002.

³²¹ Section 12(1) of the Unemployment Insurance Act 63 of 2001.

³²² Section 16(1)(a) of the Unemployment Insurance Act 63 of 2001.

³²³ Section 16(1) of the Unemployment Insurance Act 63 of 2001.

³²⁴ Section 14(b) read with s 16 of the Unemployment Insurance Act 63 of 2001.

³²⁵ Section 2(3) of the Unemployment Insurance Act 63 of 2001. The Minister may amend the scale of benefits. His discretion to determine an amount is fettered in that a maximum of 60% is set for lower earning employees, while a lower rate of remuneration must be calculated in terms of Schedule 1 for higher earning employees. See also s 12(2)(b) of the Unemployment Contribution Act 4 of 2002 and the scale of benefits as set out in Sched N1 and N2.

³²⁶ Section 13(3) of the Unemployment Insurance Act 63 of 2001.

³²⁷ Section 13 of the Unemployment Insurance Act 63 of 2001.

³²⁸ Schedule 2 of the Unemployment Insurance Act 63 of 2001.

³²⁹ Bhorat Haroon & Cheadle Halton 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' Development Policy Research Unit University of Cape Town 2010 PB 10 - 27 at 3.

would usually not claim unemployment insurance if they expect to be kept on by the employer.³³⁰

South Africa has no legislative umbrella or overall framework for social security. The regulatory framework does not lend itself to the accommodation of non-citizens, the informally employed or atypical employees. Social security mechanisms are generally extended only to those falling within the definition of 'employee'.³³¹ South Africa follows a risk-based approach.³³² The country does not follow a comprehensive approach to social protection.³³³ In as far as social insurance is concerned, employees are generally on a bad footing. The country has a weak social insurance system. There is no mandatory retirement or health insurance provision.³³⁴

Collective bargaining is the main mechanism to ensure proper healthcare cover and private insurance. As mentioned, fixed term employees are often not members of trade unions. South Africa also does not provide for a scheme offering universal coverage. The costs of social insurance could be prohibitive for fixed term workers. Migrant workers employed on fixed term contracts experience difficulties in accessing social security benefits when they return to their homes.³³⁵ In addition, South Africa's social security system does not cover persons who have never held a job. Employed persons can also not feel too confident. South Africa has a weak system of mandatory contributions. The effect of this is that fixed term employees, generally do not have

Accessible at <http://www.dpru.uct.ac.za/sites/default/files/sites/default/files/DPRU%20PB%2010-27.pdf> (5 November 2012).

³³⁰ See the discussion under 3.2.3.10 in Ch 3.

³³¹ Olivier Marius 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199 at 2201 & 2205.

³³² Section 4 of the Social Assistance Act 13 of 2004. Certain risks or contingencies are identified against which protection is provided. Social Assistance is for instance accessible in the event of old age, disability or when child support is required. Provision is also made for assistance to foster parents, for care dependency grants and grants in aid and War Veteran provisions. This restrictive approach is one which may be viewed as being traditional. The ILO Social Security (Minimum Standards) Convention 102 of 1952 also mentions a number of similar social risks as core standards. South Africa's social insurance scheme is also risk-based and mainly aims to replace income in times of unemployment. In this regard see Olivier Marius and Govindjee Avinash 'Labour Rights and Social Protection of Migrant Workers: In Search of a Coordinated Legal Response' at 4 Paper presented at the Inaugural conference of the Labour Law Research Network (LLRN) in Barcelona, Spain on 13-15 June 2013 accessed at http://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_OliviervGovind.pdf (6 April 2014).

³³³ Dekker AH Prof 'Inclusion and revolution: Social assistance for non-citizens in South Africa and SADC Paper presented at 1st International Workshop on Trans-Border Commercial Law (19 October, Johannesburg).

³³⁴ Olivier Marius 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' at 2204.

³³⁵ See in general Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 831. See also ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 30.

access to medical or social insurance cover.³³⁶ The right to social security is applicable to fixed term employees, but legislation enacted to give effect to this right is in many respects better suited to full-time permanent employment.

The contributory principle establishes a firm relationship with the formal labour market.³³⁷ The temporary nature of fixed term employees' could exclude them from the social security schemes if they are unable to make the required contributions. The benefits that are attached to these schemes often are more limited for fixed term employees than for indefinitely appointed employees. Due to intermittent spells of unemployment and as a result of the temporary nature of fixed term employment, in as far as social security is concerned, fixed term employees are often worse off than their colleagues who are appointed on indefinite contracts.³³⁸

1.2.6.3 Social assistance

The Social Assistance Act³³⁹ makes provision for social assistance grants. Unemployment and loss of income are identified as risks against which employees should be covered.³⁴⁰

In addition, a non-contributory old age benefit from the state, to be paid to women and men over the age of 60 years, is provided for.³⁴¹ The demand for this benefit is very high. It is often abused as a means to maintain entire families.³⁴² Due to the fact that there are no eligibility qualifications except for the means test, the social assistance programme has the unintended negative effect of discouraging employment as well as precautionary saving for old age. Consequently a poverty trap is created.³⁴³

³³⁶ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 9.

³³⁷ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1278.

³³⁸ RIA of 2010 at 64.

³³⁹ Social Assistance Act 13 of 2004.

³⁴⁰ Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) at 159.

³⁴¹ Section 10 of the Social Assistance Act 13 of 2004. Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) 144.

³⁴² Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) at 143.

³⁴³ Generally employed persons save too little to live comfortably after retirement. According to a 2013 survey performed on 200 000 members of Alexander Forbes, about 65% of retirees receive between zero and 20% of their last salary per month after they stop working. Slightly more than 20% of retired persons get between 20% and 40% of the salary that they earned on their final pay cheque. Less than 10%

Employees may voluntarily become a member of a provident fund or participate in a pension fund as methods of employer-supported personal saving.³⁴⁴ Unfortunately, fixed term employees are often excluded from the second option. Pension fund benefits are usually exclusively made available to indefinitely appointed employees.³⁴⁵ There is also no mandatory protection mechanism for people who are required to stop working as a result of old age.³⁴⁶ Fixed term employees who are not assured of a long term income, may be unable to or unwilling to invest savings into provident funds or annuities. Fixed term employees who are appointed after having reached the normal or mandatory retirement age in the workplace would also be hard-pressed to prove an unfair dismissal if the employer decides it is time for them to leave. This would definitely mitigate the possibility of a claim based on reasonable expectation of continuance of employment.³⁴⁷

1.3 The right to equal treatment

South Africa has enacted legislation aimed particularly at prohibiting discrimination and promoting equity.³⁴⁸ The constitutional equality clause³⁴⁹ and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) were enacted to be of general application.³⁵⁰ The EEA applies specifically to the employment relationship.³⁵¹

received 40 to 60% of their salary after they retire. Only about 6% of people will when they retire receive 60% or more of what they earned. In order to maintain the living standard to which they have become accustomed, retirees need to receive at least 75% of what they had earned while working. It is estimated that only about 2% of the work force will currently live comfortably after retirement. These people generally start saving from an early age. In order to achieve a fair living standard after retirement, you need to work while saving activity, for at least 40 years. Joubert Niel 'Pensioen: Beskerm jou aftreegeld. Lewenstyl mag nie met more se geld gefinansier word nie' Sake24 in *Beeld* of 31 August 2013 12.

³⁴⁴ Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) at 138.

³⁴⁵ See for instance *Wood v Nestlé (SA) Pty Ltd* (1996) 17 ILJ 184 (IC) at 185. See also *Tsonanyane v University of SA* (2009) 30 ILJ 2669 (GNP) at para 12 and *Democratic Nursing Organisation of SA 7 others v Somerset West Society for the Aged* (2001) 22 ILJ 919 (LC) at paras 26 & 35.

³⁴⁶ Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (2003) at 138.

³⁴⁷ See the discussion under 3.2.3.8 in Ch 3.

³⁴⁸ Section 9 of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the EEA were all enacted to serve this purpose.

³⁴⁹ Section 9 of the Constitution applies to everyone. This includes even juristic persons. In this regard see ss 7 and 8 of the Constitution.

³⁵⁰ Sections 6 & 24 of the PEPUDA. The PEPUDA is intended to provide protection to 'any person' and like s 9 of the Constitution also binds the State.

³⁵¹ Section 4 of the EEA.

South Africa's Constitution is shaped in accordance to the International Covenant on Civil and Political Rights,³⁵² the African Charter on Human and Peoples' Rights³⁵³ and the International Convention on the Elimination of All Forms of Racial Discrimination.³⁵⁴ In terms of the International Covenant on Civil and Political Rights, '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'³⁵⁵ The African Charter on Human and Peoples' Rights Convention³⁵⁶ likewise prohibits discrimination.³⁵⁷

1.3.1 The constitutional right to equality

Section 9 of the Constitution provides that everybody is viewed as equal and have equal rights to protection and benefit of the law. This provision prohibits direct or indirect discrimination³⁵⁸ against anyone on the grounds listed therein³⁵⁹ or grounds analogous thereto.³⁶⁰ The grounds listed are race, colour, ethnic origin, gender, sex, pregnancy, sexual orientation, marital status, age, disability, religion, conscience and belief, culture, birth and social origin. Discrimination on the listed grounds has the potential to demean a person's humanity or dignity.³⁶¹ Davies AJ in *Kylie v CCMA*³⁶² notes that the

³⁵² South Africa ratified this covenant on 10 December 1998. The Covenant on Civil and Political Rights is accessible at <http://www.hrweb.org/legal/cpr.html> (21 June 2013).

³⁵³ This Charter is also known as the 'Banjul Convention'. South Africa acceded to it on 9 July 1996. The African Charter on Human and Peoples' Rights is accessible at http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (21 June 2013).

³⁵⁴ South Africa adopted the International Convention on the Elimination of All Forms of Racial Discrimination on 10 December 1988. This instrument is accessible at <http://www2.ohchr.org/english/law/cerd.htm> (21 June 2013). See also *Government of the Republic of South Africa and others v Grootboom* 2000 [11] BCLR 1169 (CC) at paras 26 – 31.

³⁵⁵ Article 26 of the International Convention on Civil and Political Rights.

³⁵⁶ This Charter was adopted by the Organisation of African Unity on 27 June 1981 at the 18th Conference of Heads of State and Government held at Nairobi.

³⁵⁷ Article 26 of the African Charter determines that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

³⁵⁸ Indirect discrimination manifests in criteria applied to employees that appeared to be neutral, but negatively affect the particular group in a way which is not justifiable. *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) at 298G.

³⁵⁹ See *Harksen v Lane* 1998 (1) SA 300 (CC) at para 49.

³⁶⁰ Analogous grounds are those 'based on attributes or characteristics which has the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparable serious manner.' See *Harksen v Lane* at para 46.

³⁶¹ Section 9(1) of the Constitution. The term 'differentiation' is defined as 'constituting a difference between or in' something. Allen RE *Concise Oxford Dictionary of Current English* 8th edn (Clarendon Press Oxford

Constitution 'reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule. The text represents a majestic assertion of the possibility of the construction of a community of concern, compassion and restitution for all such segments of the South African community.'³⁶³ Section 9 is aimed at preventing unequal treatment on these grounds that could result in the construction of disadvantage that was part of South African history. The grounds listed were been used to categorise and marginalise certain persons in the past.³⁶⁴

In *Harksen v Lane NO & others*³⁶⁵ the court held that 'discrimination' denotes the potential to impair a person's dignity or to affect them adversely in a comparably serious manner. Discrimination is a relative concept. It can only be established by measuring the incumbent's position against others in comparable positions.

The constitutional right to fair labour practices³⁶⁶ when read together with the equality clause, makes it clear that employers should not be prejudiced against certain employees and treat them all fairly and consistently. Therefore, the Constitution imposes an obligation of fairness towards a fixed term employee on the employer when it makes decisions affecting him or her in his or her work.

The Constitution prohibits discrimination that is unfair. This implies that certain types of discrimination can be fair, or that they would not necessarily be regarded as being unfair.³⁶⁷ In *Louw v Golden Arrow Bus Services (Pty) Ltd*³⁶⁸ Landman J also held that a distinction should be drawn between discrimination on permissible grounds and impermissible grounds. It would only qualify as an unfair labour practice if the

1991) at 325. See also the Currie & De Waal *The Bill of Rights Handbook* (2005) at 245 – 246 where the concept 'fair discrimination' is elaborated on.

³⁶² 'Kylie' v CCMA (2010) 31 ILJ 1600 (LAC).

³⁶³ 'Kylie' v CCMA (LAC) at para 50.

³⁶⁴ 'Kylie' v CCMA (LAC) at para 50.

³⁶⁵ *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 47. See also Grogan *Employment Rights* (2010) at 174.

³⁶⁶ Section 23 of the Constitution. See the discussion under 1.2 above.

³⁶⁷ This is supported by s 6(1)(a) of the EEA which sanctions reverse or restitutionary discrimination or favouring previously disadvantaged groups. Grogan *Employment Rights* (2010) at 175. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at paras 60 – 61. The Constitutional Court declares such remedial or restitutionary equality a necessity in addressing the social imbalances resulting from apartheid. Apartheid led to structural and systemic discrimination in South Africa as a result of racist and sexist practices in South African law. In *Minister of Finance & others v Van Heerden* 2004 (6) SA 121 (CC) at 121C – D it is confirmed that, if the internal test in s 9(2) of the Constitution is complied with, differentiation or discrimination would be warranted.

³⁶⁸ *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) at 197B.

impermissible grounds are the cause of the discrimination. Disparate treatment as such does not qualify as discrimination on a listed ground unless that ground is the reason for the disparate treatment.³⁶⁹

In *Harksen v Lane NO*³⁷⁰ the Constitutional Court indicated that an enquiry into discrimination under s 9 of the Constitution has to go through multiple stages. Firstly it must be established whether there had been a differentiation in treatment. Thereafter a two-stage enquiry must be conducted in order to ascertain whether or not disparity in treatment constituted unfair discrimination. The first stage entails identifying whether or not the differentiation fell into one of the listed grounds in which case unfairness will be presumed. The employer bears the onus of proving that the discrimination was not unfair. Before an employee can be dismissed for a reason related to one of the listed grounds, a rational connection must be established by the employer between the purpose of the discrimination and the measure that was taken.³⁷¹

If the claim is not based on one of the listed grounds, it has to be determined whether or not the infringement nevertheless has the potential to infringe upon a person's human dignity. Under these circumstances, the person who claims that this is the case, will be required to prove it. The second stage entails consideration of the possible justification for the discrimination. This entails establishing whether the right can be limited under the general limitation clause.³⁷²

In determining whether or not discrimination on a ground not specifically mentioned in the provision has a potentially unfair impact, certain factors should be considered: Firstly, the position of the complainant in society, i.e. their standing of relative advantage or disadvantage should be taken into account. Secondly, the purpose of the discriminatory conduct and whether or not it has a societal goal. Finally, the extent in which the fundamental rights have been infringed upon and whether or not the discrimination has resulted in impairment of dignity is determined.³⁷³

³⁶⁹ See also *Harksen v Lane NO & others* [1997] ZACC 12; 1998 (1) SA 300 (CC) at para 48; *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC) at 299 and *TGWU & another v Bayete Security Holdings* (1999) 4 BLLR 401 (LC) at 402D - G in which this view is supported.

³⁷⁰ *Harksen v Lane NO* at para 53.

³⁷¹ *Department of Correctional Services & another v Police and Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) at paras 15 – 16 & 21.

³⁷² Currie & De Waal *The Bill of Rights Handbook* (2005) at 235 – 237.

³⁷³ *Harksen v Lane NO* at para 52.

Fixed term employees are often denied the same rights, benefits and protection as permanent employees.³⁷⁴ Fixed term employees are indirectly discriminated against by legislation and in collective bargaining which require a minimum duration of employment for the attainment of benefits. Therefore, employers have been allowed to unfairly discriminate against employees based on how they were appointed. This constitutes an infringement of the constitutional right to equality and fair labour practices. Discrimination based on contractual status is not one of the listed grounds in s 9 of the Constitution and therefore, it is not in itself justiciable, unless it is possible to prove that the discrimination was arbitrary and impacted negatively on the aggrieved employee's dignity.³⁷⁵

Fixed term appointments contribute to diminished credit worthiness. While appointed on a fixed term contract, the banks are unwilling to extend credit facilities to persons so appointed.³⁷⁶ In effect, fixed term employees are often unable to gain access to credit facilities to purchase vehicles or homes. It is even more difficult to open an account at an outlet.

Unequal treatment as a result of employment status definitely impacts negatively on the dignity of fixed term employees. Fixed term employees who do the same work as full-time employees, but receive less favourable treatment could possibly claim based on an infringement of their fundamental rights.³⁷⁷ Thus far, this form of indirect discrimination against fixed term employees has not been tested.

In England, the court considered the application of this principle in *Department of Work and Pensions v Webley*.³⁷⁸ In this case the fixed term employee had been employed in terms of a series of fixed term contracts. After working for the employer for 51 consecutive weeks, the employer did not renew her contract. The fixed term employee alleged that her employer had chosen to dismiss her instead of dismissing a permanent employee. Consequently she claimed that she had been treated less favourably because her fixed term employee status.

³⁷⁴ *Wood v Nestlé (SA) Pty Ltd* (1996) 17 ILJ 184 (IC) at 851I.

³⁷⁵ Notably it is also not one of the grounds listed in s 6 of the EEA.

³⁷⁶ A credit record of the last 2 – 3 years at a set income received preferably from the same employer needs to be produced. Information acquired by personal enquiry to Absa bank, Standard Bank and FNB.

³⁷⁷ Gericke 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment.' at 3 - 4.

³⁷⁸ *Department of Work and Pensions v Webley* [2004] EWCA Civ 1745.

In the initial stages of the case the fixed term employee was successful. But, the Court of Appeal upheld the subsequent appeal and held that the essence of a fixed term contract is that it is intended to come to an end at the expiry of the fixed term.³⁷⁹ Lord Justice Ward, Jacob and Wall all concurred that ‘the termination of a [fixed term] contract by the simple effluxion of time cannot, of itself, constitute less favourable treatment by comparison with a permanent employee.’³⁸⁰

Dismissal can have a devastating effect on a fixed term employee’s dignity. However, a fixed term employee would be hard-pressed to prove that discrimination based on contractual status alone was the reason for him or her being dismissed. A claim based on this type of unfair discrimination would require proof of another ground of discrimination connected to the grounds that are listed in the legislation.

1.3.2 The EEA

The EEA was the first equality legislation passed by a democratically elected Parliament in 1998 to give effect to the constitutional provisions relating to equality in South Africa. The EEA seeks to restore human dignity and human rights that were denied to the majority of the South African populace by promoting equal opportunities and fair treatment.³⁸¹ The legislation follows a two-thronged approach by eliminating unfair discrimination³⁸² and causing the implementation of affirmative action measures to promote upliftment of certain identified groups of employees.³⁸³

Section 6 of the EEA, much like s 9 of the Constitution, prohibits direct or indirect discrimination,³⁸⁴ but in particular in the sphere of employment.³⁸⁵ No definition for

³⁷⁹ *Department of Work and Pensions v Webley* at paras 36 - 37.

³⁸⁰ *Department of Work and Pensions v Webley* at para 36.

³⁸¹ Section 2 of the EEA. See also Ramutloa Lloyd ‘Speech by the Minister of Labour, Hon. Mildred N Oliphant, MP on the occasion of the Employment Equity and Transformation Indaba, Birchwood, Johannesburg’ accessed at <https://www.labour.gov.za/media-desk/speeches/2013/speech-by-the-minister-of-labour-hon-mildred-n-oliphant-mp-on-the-occasion-of-the-employment-equity-and-transformation-indaba-birchwood-johannesburg> (21 May 2013).

³⁸² Section 2(a) of the EEA.

³⁸³ Section 2(b) of the EEA. See also Grogan *Employment Rights* (2010) at 170.

³⁸⁴ Item 5.2.2 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

³⁸⁵ Benjamin P ‘A Review of the Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives’ (2005) at 4.

'discriminate' is provided in the EEA.³⁸⁶ It is impermissible to unfairly discriminate on an employee's race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.³⁸⁷ Therefore, the EEA prohibits discrimination on the same grounds as listed in s 9 of the Constitution, but adds pregnancy, family responsibility and HIV status. The EEA also prohibits harassment on any of the grounds mentioned in s 6(1).³⁸⁸ The intention of the legislation is to prohibit unfair discrimination by any person. This may render the scope of protection provided in terms of the EEA sufficiently wide to also include fixed term employees who are employed through temporary employment services.³⁸⁹

The EEA obliges employers to take steps to promote equitable opportunities by eliminating discriminatory policies and practices in the workplace. The EEA defines 'employment policy or practice' as including 'recruitment procedures, advertising and selection criteria; appointments and appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the work environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal and dismissal.'³⁹⁰

The Constitution includes affirmative action policy as a mechanism for the achievement of equality.³⁹¹ Section 9(2) of the Constitution sanctions the development of legislative

³⁸⁶ In addition, only unfair discrimination is prohibited. 'Unfair discrimination' includes both action and inaction (omissions). See item 5.2 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures in *GG No. 27866* (4 August 2005).

³⁸⁷ Section 6(1) of the EEA.

³⁸⁸ Section 6(3) of the EEA. In *Grogan Employment Rights* (2010) at 175 Grogan indicates that harassment means 'any form of systemic action that is prejudicial or injurious to an employee, provided that it is motivated by one of the grounds listed in section 6(1) or a combination thereof.' Harassment also includes sexual harassment. See for instance *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) at 2377 – 2378 and *Piliso v Old Mutual Life Assurance Company* (2007) 28 ILJ 897 at para 23.

³⁸⁹ *Grogan Employment Rights* (2010) at 171. Labour broking relationships are governed by s 198 of the LRA. See *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC) and *NUM & others v Billard Contractors CC & another* [2006] 12 BLLR 91 (LC) at para 79. Atypical work may either involve 'direct' employees (part-time and fixed term employees) and 'indirect' employees where more than one employer or client is involved (labour broking, out-sourcing, sub-contracting). Employees working in this type of arrangement arguably also falls within the definition of 'fixed term employee' as used herein.

³⁹⁰ Section 1 of the EEA.

³⁹¹ Unlike formal equality which relates to equal treatment of individuals, this is a form of substantive equality to ensure that is aimed at ensuring equality in outcome. Disparity in treatment is allowed in terms of the Constitution to achieve this purpose. See Loenen Titia 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 *SAJHR* 405 at 410. See

measures to protect or advance persons who were previously disadvantaged by unfair discrimination.³⁹²

The affirmative action provisions are contained in Chapter III of the EEA. This part of the legislation only applies to 'designated employers' and 'designated groups of employees.'³⁹³ Employers who employ less than 50 employees are also excluded from the application of the affirmative action provisions.³⁹⁴ Designated employers³⁹⁵ are obliged to implement an employment equity plan in the workplace so as to establish affirmative action measures. Black persons,³⁹⁶ women and persons with disabilities fall within the classification of 'designated groups of employees'.³⁹⁷ The specified groups are not defined by disadvantage, but by race, gender and disability. The EEA does not require proof of personal historic discrimination. The fact that an individual falls within one of the identified groups of the populace is sufficient.

Persons who are not South African citizens are not considered beneficiaries for purposes of the EEA.³⁹⁸ In order to prove disadvantage, a foreign claimant must show that he or she was member of a group that had been disadvantaged by general societal discrimination inherent in the South African working environment. In *Auf der Heyde v University of Cape Town*,³⁹⁹ a white male South African citizen, who was appointed in terms of a fixed term contract, was passed over for a permanent appointment as a lecturer. A black person who was not a South African citizen was appointed instead. The employer relied on its affirmative action policy to justify the discrimination. The court

also item 5.2.3 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

³⁹² Section 15(1) of the EEA describes affirmative action measures as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the workforce of a designated employer.'

³⁹³ Section 4(2) of the EEA.

³⁹⁴ See the definition of 'designated employer' in s 1 read with s 20 of the EEA.

³⁹⁵ In s 1 of the EEA 'designated employer' is defined as an employer who employs 50 or more employees, or less than 50 employees, but who has a total annual turnover which exceeds the annual turnover described in the Act, and municipalities and other state organs or employers who is designated in terms of a collective agreement. Schedule 4 to the EEA provides for different threshold amounts for designated employers. The turnover threshold is currently set at R5 million.

³⁹⁶ This is a generic term which also includes coloured persons and Indians. Chinese people were since 2008 also included under this classification. See the order in *Chinese Association of South Africa & others v Minister of Labour & others* accessible at <http://www.saflii.org/za/cases/ZAGPHC/2008/174.pdf> (17 October 2012).

³⁹⁷ Section 1 of the EEA.

³⁹⁸ Amendment to the Employment Equity Regulations General Notice R841 published in GG No. 29130 on 18 August 2006.

³⁹⁹ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC).

rejected this argument since the person who was appointed had not been previously disadvantaged.⁴⁰⁰

In terms of the EEA, designated employers are required to apply affirmative action. In doing so, they are required to identify and eliminate existing employment barriers for designated groups.⁴⁰¹ In addition, designated employers must implement measures to promote diversity in the workplace.⁴⁰² This measure, introduced to retain and promote designated groups of employees through training, includes preferential treatment.⁴⁰³

Numeric goals may be established in this regard, but quotas should not be set, particularly if it would set an absolute barrier to the continued advancement of persons not falling within the designated groups.⁴⁰⁴ The social purpose of the EEA is to promote broad representativity⁴⁰⁵ and not to reach quotas.⁴⁰⁶ Such a policy must not only be viewed by the court as a mechanism that is evidently designed to achieve adequate advancement or protection of previously disadvantaged persons, but it must also be implemented consistently by the employer.⁴⁰⁷

Affirmative action provisions in the EEA are misinterpreted by many as an exception to the right to equality and the prohibition against unfair discrimination.⁴⁰⁸ In *Henn v SA Technical (Pty) Ltd*⁴⁰⁹ a white female applicant for a job was rejected because of employment equity demographics. The respondent conceded that it had discriminated against her on the basis of her race, but argued that that it was obliged to apply

⁴⁰⁰ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 at paras 69 – 72.

⁴⁰¹ Section 15(2)(a) of the EEA.

⁴⁰² Section 15(2)(b) of the EEA.

⁴⁰³ Section 20 of the EEA.

⁴⁰⁴ Sections 15(3) & 15(4) of the EEA.

⁴⁰⁵ Representativity means the promotion of a more equitably represented public and private sector relative to the composition of South Africa's populace. To date regional figures have been used to establish representativity in the workplace, but it has been proposed in the Employment Equity Amendment Bill of 2012 that national statistics should be used instead. See Joubert, Jan-Jan 'Regstel-aksie 'n belediging' in *Beeld* of 1 May 2013 at 4.

⁴⁰⁶ Although equity in the demographic profiles is important, transformation is also considered an aide to instil confidence and a sense of participation and belonging in persons who were previously excluded. It is intended to promote equal opportunity and diversity in the workplace. Kalula Evance Prof 'The Will to Live and Serve: Personal Reflections on Twenty Years of Continuity and Change in the Faculty of Law, 1992 – 2012. Farewell Lecture to the Faculty of Law - University of Cape Town.' (5 August 2013) at 12. See also *Coetzer & others v Minister of Safety & Security* 2003 (3) SA 368 (LC) at 376D – E.

⁴⁰⁷ Section 9(2) of the Constitution.

⁴⁰⁸ Affirmative action is not an exception to the right to equality, but a way to ensure the enjoyment of equal rights and freedoms by addressing the historic inequalities in South Africa. Currie & De Waal *The Bill of Rights Handbook* (2005) at 264.

⁴⁰⁹ *Henn v SA Technical (Pty) Ltd* (2006) 27 ILJ 2617 (LC).

affirmative action measures. Therefore, she was not unfairly discriminated against. The Court noted that the respondent's conduct was not contrary to its policy and that it was justified in preferring suitably qualified black females. The LC, per Ngcamu AJ, consequently held that the employer was entitled to discriminate on the basis of race as it was complying with affirmative action as provided for in s 6(2)(a) of the EEA.⁴¹⁰ However, in *Minister of Finance v van Heerden*⁴¹¹ the Constitutional Court held that there is no presumption favouring the fairness of affirmative action measures.

Despite the constitutional mandate to prefer certain persons in making appointments, designated employers are not obligated to do so unless they are suitably qualified. However, the court has held that when deciding whether or not a person is 'suitably qualified' an employer should not hold a designated employee's lack of relevant experience against him or her.⁴¹² If the person is capable of acquiring the necessary competency to perform the work within a reasonable time, he or she should be appointed.⁴¹³ Therefore, an affirmative action candidate only needs to prove the potential ability to perform the work within a reasonable period of time if provided with the necessary training and mentoring. What is required is only the competency of such a person to learn how to perform the tasks he or she is expected to do. It would seem that fixed term employees who fall within the classification of 'designated employee' would benefit.

However, this provision strengthens the need for on-the-job training which is unfortunately something that fixed term employees are often denied. A fixed term employee outside the auspices of the 'designated groups' will be hard-pressed to object to the appointment of an affirmative action candidate based on his or her lack of experience. In my opinion this affirmative action provision should not enable an employer to escape legal obligations relating to termination of a fixed term employee who is not a 'designated employee'. A fixed term employee appointed to stand in for someone else during his or her absence should already be equipped to do the work

⁴¹⁰ *Henn v SA Technical (Pty) Ltd* at para 45.

⁴¹¹ *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC) at 137B - C.

⁴¹² This is a sound application of s 20(3) and (4) of the Employment Equity Act 55 of 1998 which provides that an individual will qualify as being suitable for appointment if he or she has received formal education which meets the required standards, or if he or she has received sufficient prior learning, or evidences the capacity to within a reasonable time develop the required skills and knowledge, or a combination hereof.

⁴¹³ Section 20(5) of the EEA. See also *Gruenbaum v SA Revenue Service (Customs & Excise)* CCMA case number KN20090 (6 November 1998).

upon his or her appointment. The commercial rationale for making a short term appointment would be undermined by a need to in such a time undergo training prior to being able to perform the assignment the fixed term employee was appointed for.

The way in which the affirmative action provisions contained in the EEA are being enforced by employers may very well impact negatively on certain fixed term employees. Due to a lack of suitably qualified candidates from the designated groups, there may be operational reasons to appoint persons outside the designated groups on fixed term contracts. Employers who are committed to affirmative action policies may be particularly disinclined to consider appointing or promoting white male employees.⁴¹⁴ Continued failure to find suitably qualified employees from the pool of previously disadvantaged employees may result in the fixed term contract being continuously renewed. This practice may lead to the untenable position that these fixed term employees are prejudiced and discriminated against in many procedures and policies. This clearly contradicts the purpose of the EEA to prevent discrimination in the workplace. With increased pressure to promote representativity on all workplace levels and insufficient job growth, the practice of retiring employees who are not 'designated employees' to make room for appointment of those who do, may also detriment especially older fixed term employees.⁴¹⁵

Affirmative action policies may result in unfairness to designated groups of employees too. Designated employees' morale may be thwarted by the perception that they are not appointed based upon considerations of merit. Skilled workers may exit the country as a result of improper enforcement of the legislation contrary to its purpose.⁴¹⁶ Therefore it is very important to maintain a balance between representativity and efficiency.⁴¹⁷

⁴¹⁴ The practice of unfairly discriminating against certain groups of fixed term employees by only appointing certain groups of workers on a temporary basis is identified as one that could potentially hamper employment equity. In this regard, see item 11.3.6 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴¹⁵ Geldenhuys Judith 'Challenges Faced by an Ageing South Africa' Ch 8 of Vettori Stella (ed) *Ageing Populations and Changing Labour Markets – Social and Economic Impacts of the Demographic Time Bomb* (Gower Publishing 2010) at 202 – 204.

⁴¹⁶ Joubert Jan-Jan 'Regstel-aksie 'n belediging' in *Beeld* of 1 May 2013 at 4.

⁴¹⁷ In *Coetzer & others v Minister of Safety & Security* 2003 (3) SA 368 (LC) at paras 22, 28 – 29, 32 & 38 – 40. Landman J noted that attention should not only be paid to the achievement of representativity. Due regard must be paid to the impact of appointments on efficiency. See also *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) at 1032 - 1034 and *Gruenbaum v SA Revenue Service (Customs & Excise)* CCMA case number KN20090 6 November 1998.

1.3.3 The PEPUDA

The PEPUDA is binding upon ‘the State and all persons’.⁴¹⁸ In case of a conflict between the provisions of the PEPUDA and any other legislation except for the Constitution, the provision as contained in the PEPUDA enjoys preference.⁴¹⁹ However, this piece of legislation does not apply to persons covered by the EEA to the extent that it provides protection to such a person.⁴²⁰

The burden of proof in matters brought under PEPUDA is articulated in the legislation itself.⁴²¹ In essence, the complainant is required only to make out a prima facie case of discrimination where after the respondent will be required to either prove that no discrimination occurred or that the discrimination does not fall within the grounds listed.⁴²² If there was discrimination, the discrimination will be deemed unfair unless the respondent is able to prove the contrary.⁴²³

The PEPUDA, unlike the EEA, provides guidelines in the legislation itself on how the fairness of discrimination is to be determined.⁴²⁴ In terms of this provision it would not be unfair for employers to advance groups of persons who were previously disadvantaged as a result of systemic discriminatory practices.⁴²⁵ In order to establish whether the respondent has succeeded in proving that the discrimination is not unfair, the legislation sets out factors that should be considered.⁴²⁶

The presiding officer should, in making this determination, take into account the context of the differentiation⁴²⁷ and whether the discrimination is justifiable in relation to objective criteria that are inherent to the specific activity.⁴²⁸ In addition, other factors (not provided as a conclusive list) should be taken into account.⁴²⁹ The first factor mentioned is the impairment or the likelihood that the discrimination would impair on the complainant’s

⁴¹⁸ Section 5(1) of the PEPUDA.

⁴¹⁹ Section 5(2) of the PEPUDA.

⁴²⁰ Section 5(3) of the PEPUDA.

⁴²¹ Section 13 of the PEPUDA.

⁴²² Section 13(1) of the PEPUDA.

⁴²³ Section 13(2) of the PEPUDA.

⁴²⁴ Section 14 of the PEPUDA.

⁴²⁵ Section 14(1) of the PEPUDA.

⁴²⁶ Section 14(2) of the PEPUDA.

⁴²⁷ Section 14(2)(a) of the PEPUDA.

⁴²⁸ Section 14(2)(c) of the PEPUDA.

⁴²⁹ Section 14(2)(b) of the PEPUDA.

human dignity.⁴³⁰ Also the likely impact that the discrimination would have on him or her and his or her position in society and whether he or she falls within a group or category of persons, who has been subjected to discrimination in the past, should be considered in making such a determination.⁴³¹ In addition the provision covers the factors that are considered in terms of the limitation clause as contained in the Constitution.⁴³² The Equality Court is required to consider the nature of the discrimination, the purpose of the discrimination and to what extent, if any, the discrimination achieves this goal, whether there are less intrusive ways of achieving the same result and whether the respondent reasonably attempted to address disadvantage suffered in respect of one of the listed grounds or to in so doing accommodate diversity.⁴³³

The PEPUDA provides a list of different practices that may qualify as unfair discrimination in certain employment sectors.⁴³⁴ The list of practices that are used to illustrate unfair conduct is not conclusive, but is nevertheless instructive of what would constitute possible grounds of unfair discrimination. The fact that the PEPUDA expressly excludes labour disputes that fall under the auspices of the EEA from its application, to a large extent limits any value which these provisions may have. Arguably, the provisions related to equal pay could be instructive since the EEA has no provisions relating to this topic.

An employer's failure to 'respect the principle of equal pay for equal work' and perpetuating discriminatory practices in respect of income differentials are pertinently recognised as a potential unfair practice in terms of the PEPUDA.⁴³⁵

Considering the defences that are made available under s 6 of the EEA, i.e. affirmative action⁴³⁶ and inherent requirement of the job⁴³⁷ and its obvious irrelevance in an investigation regarding equal provision of benefits and equal pay, it is obvious that this is not the correct landscape for these important provisions. Placing cursory provisions

⁴³⁰ Section 14(3)(a) of the PEPUDA.

⁴³¹ Section 143(b) and (c) of the PEPUDA.

⁴³² Section 36 of the Constitution.

⁴³³ Section 143(d) – (i) of the PEPUDA.

⁴³⁴ Section 29 of the PEPUDA.

⁴³⁵ Section 29(1)(c) and (d) of the PEPUDA.

⁴³⁶ Section 6(2)(a) of the EEA.

⁴³⁷ Section 6(2)(b) of the EEA.

regarding equal treatment in respect of payment (an *essentialia* of employment)⁴³⁸ in a piece of equality legislation that generally does not apply to those persons acknowledged as 'employees', serves little purpose for fixed term employees. This is true particularly in the light of the extension of who is considered to be an 'employee'.⁴³⁹

The matter of equal pay for equal work is also referred to in the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.⁴⁴⁰ This Code, unlike the Code of Good Practice: Dismissal is not referred or incorporated into the LRA.⁴⁴¹ Whereas the Code of Good Practice: Dismissal is strictly enforced in unfair dismissal cases and often referred to in decisions,⁴⁴² I was unable to find any awards or decisions related to equal pay in which the Code of Good Practice for Integration of Employment Equity into Human Resource Policies and Procedures was even referred to. This Code applies to all employers and employees covered by the EEA. However, it expressly determines that it is intended to serve as guidelines that employers may consider and apply as they are appropriate.⁴⁴³

Nevertheless, the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures does provide important information regarding the method to be used by employers to determine remuneration or wages of employees in an indiscriminate way. Item 6 of the Code describes the method of performing a job analysis and the importance of a job description.⁴⁴⁴ In addition the Code of Good Practice for the Integration of Employment Equity into Human Resource

⁴³⁸ *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC) at para 13. See also *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at para 22.

⁴³⁹ *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC) at para 42.

⁴⁴⁰ Item 11.4.1 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures determines that an employer is obliged to pay employees the same amount of remuneration for equal work of if they perform work of equal value.

⁴⁴¹ The Code of Good Practice: Dismissal is in sched 8 to the LRA.

⁴⁴² See for instance endnote 14 in *SACCAWU v Irvin & Johnson* 2000 (3) SA 705 (CC) and *Rustenburg Platinum Mines Ltd v CCMA & others* 2007 (1) SA 576 (SCA) at paras 7 & 173. See also *Karras t/a Floraline v SA Scooter and Transport Allied Workers Union & others* (2000) 21 ILJ 2612 (LAC) at para 26 and *Standard Bank of SA v CCMA* (2008) 29 ILJ 1239 (LC) at para 59.

⁴⁴³ Items 3.3 & 3.4 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁴⁴ Item 12 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures. The job description forms the basis of the job specification which is very important for purposes of selection, recruitment and training. It also forms the basis of job evaluation and comparison of jobs of equal value. Erasmus BJ, Strydom JW & Rudansky-Kloppers S *Introduction to Business Management* at 324- 325.

Policies and Procedures sets out policies and practice that should be used to ensure pay equity.⁴⁴⁵

The Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures recommends that employers regularly audit their existing remuneration policies by comparing jobs.⁴⁴⁶ An objective and rational evaluation system should be implemented which should be applied consistently to all job functions. The remuneration policy should be set out in writing and explained to all employees in order to establish clear rules regarding the determination of remuneration.⁴⁴⁷

In determining the value of posts, the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures recommends that an employee's performance as confirmed through performance assessment evaluations should carry the most weight in determining what amount he or she should be paid.⁴⁴⁸ In addition, an employee's potential to develop competence over time should be taken into account.⁴⁴⁹ Differences in the remuneration of employees should be monitored by employers to ensure that they do not constitute unfair discrimination.⁴⁵⁰

1.3.4 The LRA

The LRA makes it clear that employers are not allowed to discriminate against employees or work-seekers for exercising any right that they enjoy in terms of the Act.⁴⁵¹ Employees or applicants for an appointment may not be discriminated against by

⁴⁴⁵ Item 12.1 – 12.4 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁴⁶ An external comparison can be done first by means of a salary survey in terms of which the salaries paid for equivalent jobs are compared by the Human Resource manager. Thereafter an internal comparison may be done. This may be done through job ranking, by using the factor comparison method and comparing the demands of a particular job on the employee. Erasmus BJ, Strydom JW, Rudansky-Kloppers *S Introduction to Business Management* at 324.

⁴⁴⁷ Items 12.3.1, 12.3.2 & 12.3.4 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁴⁸ Item 12.3.5.1 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁴⁹ Item 12.3.5.2 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁵⁰ Item 12.3.6 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

⁴⁵¹ Section 5(1) of the LRA.

for instance requiring him or her not to become a member of a trade union or a workplace forum. An employer may also not require that an employee or a work-seeker waive any right that he or she would be entitled to otherwise in terms of the LRA.⁴⁵² An employer may also not give an employee or work-seeker, or promise to provide him or her, with an advantage for not exercising a right that he or she has in terms of the LRA except to the extent that it is aimed at settlement of a dispute between the parties.⁴⁵³

1.4 The right to dignity

The right to equality has been described as the cornerstone of the protection of a person's dignity.⁴⁵⁴ The Constitution declares that it is intended to promote values of human dignity.⁴⁵⁵ It states that 'everyone has the right to have their dignity respected and protected.'⁴⁵⁶

Remuneration is acknowledged as an *essentialia* of the contract of employment⁴⁵⁷ and a dismissed employee will also acknowledge that pecuniary loss is one of the principle disadvantages of termination of employment. But, having a job or not, has to do with more than economics. Employment or the lack thereof often impact on status and social standing of the individual. An unpaid director serves as an example.⁴⁵⁸ The fact that the removal of a director is often publicised, increases the potential infringement on these fixed term employees' dignity.

The right to dignity is important in any discussion of dismissal protection because of the indissoluble link between security of employment and dignity. In *Minister of Home Affairs v Watchenuka*⁴⁵⁹ Nugent JA expressed the relationship between security of

⁴⁵² Section 5(2) of the LRA.

⁴⁵³ Section 5(3) of the LRA.

⁴⁵⁴ Section 1 of the Constitution.

⁴⁵⁵ Although no definition of 'human dignity' is provided in the Constitution, the Constitutional Court has elaborated on its meaning. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 29 Ackerman J states that human dignity requires the court to acknowledge the value and worth of all individuals as members of society. The right to human dignity has been held to be intrinsically linked or being the basis of other human rights. See also *S v Makwanyane* 1995 (3) SA 391 (CC) at para 144.

⁴⁵⁶ Section 10 of the Constitution

⁴⁵⁷ *Jack v Director-General, Department of Environmental Affairs* [2003] 1 BLLR 28 (LC) at paras 14 – 19. See also *Brown v Hicks* (1902) 19 SC 314 at 315 – 316.

⁴⁵⁸ Notably directors in non-profit companies who form part of voluntary boards are often unpaid.

⁴⁵⁹ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) at para 27.

employment and dignity of the person. He held that the freedom to work is more than a question of mere survival. It is also an important element of human dignity since meaningful association and being accepted as socially useful is so important to one's self-esteem. Likewise, in *Johnson v Unisys*⁴⁶⁰ Lord Hoffman opined that employment is one of the most important things in a person's life. Not only is it necessary for a livelihood, but it also provides a sense of identity and self-worth.

1.5 The right to basic education

The development of skills through training is beneficial to employers. In order to increase productivity and competitiveness, it makes sense to invest in the development of human capital. However, employees who have undergone job specific training may have a greater expectation of advancement.⁴⁶¹ It is probably one of the reasons why employers may be disinclined to provide fixed term employees with the same development opportunities as permanent employees. This leaves fixed term employees worse off in as far as development of skills is concerned. In addition, it impacts negatively on economic growth in the country.⁴⁶²

In terms of the Constitution everyone is entitled to basic education.⁴⁶³ Not only does this provision oblige the state to promote access to basic education in an official language of choice, it also impacts on the quality of education and skills development through on-the-job training. To give effect to this right, national and sectoral programmes have been implemented in terms of the Skills Development Act⁴⁶⁴ to provide training and develop skills so as to promote employability of employees and job-seekers.⁴⁶⁵ Employers may choose to contribute to the Skills Development Levy. Under the Skills Development Act

⁴⁶⁰ *Johnson v Unisys* [2001] 2 WLR 1076 at para 35.

⁴⁶¹ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1277.

⁴⁶² ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 29.

⁴⁶³ Section 29(1)(a) of the Constitution.

⁴⁶⁴ Skills Development Act 97 of 1998. In *SA Transport & Allied Workers Union and Metrorail Services* (2002) 23 ILJ 2389 (ARB) at 2395 - 2396 the arbitrator commented that the Skills Development Act is aimed at encouraging employers to provide employees with on the job training opportunities to acquire new skills and equip new entrants to the labour market. In this thesis only the protection of the right to fairness relating to training that is insinuated in s 186(2) of the LRA will be scrutinised. The Skills Development Act 97 of 1998 was enacted to establish a work-based education system and the development of skills. For more information regarding this piece of legislation and its application see Grogan *Employment Rights* (2010) 296 – 302.

employers are required to contribute one percent of the entire payroll.⁴⁶⁶ Fixed term employees are equally eligible for the benefits provided for under this legislation. Enhancing human resources by promoting education and training in the workplace may assist in the elevating productivity. This in turn could reduce unemployment and poverty.⁴⁶⁷

The LRA includes an unfair labour practice related to training.⁴⁶⁸ Grogan opines that this seems to suggest that employers are obliged to provide training to all employees, including fixed term employees.⁴⁶⁹ Case law in point seems to advise otherwise. In *Transnet Ltd v CCMA & others*,⁴⁷⁰ the LC for instance held that disputes based on unfair training are only justiciable if an employer's conduct in providing training was inconsistent, arbitrary or lacked due process. This seems correct. The purpose of the unfair labour practice provision is not to provide an enforceable right which would interfere with management prerogative in relation to training. A fixed term employees would not be able to base a claim on the fact that he or she had not been granted access to training, unless the employer's conduct was inconsistent or discriminatory.

Flexible work in South Africa impedes upon career progression. Since fixed term employees are usually appointed for a brief period to stand in for someone in their absence, they are usually not provided with the opportunity to develop their skills through training. The longer the temporary appointment persists, the harsher the penalty associated with a lack of personal development may be. A continuous precarious position in *curriculum vitae* may be unfavourable in the quest for permanent appointment.

Section 186(1)(b) of the LRA which regulates dismissal of fixed term employees provides no remedy for fixed term employees who were denied the benefit of training before their dismissal.⁴⁷¹

⁴⁶⁵ See the purpose of the Skills Development Act 97 of 1998 as pronounced in the preamble and s 2 thereof.
⁴⁶⁶ Section 30 of the Skills Development Act 97 of 1998 only obliges all public service employers to make contributions.

⁴⁶⁷ ILO 'Global Wage Report, Africa Brief 2010/2011' at 16. Also see the introduction to Landman JP with Borat Haroon, Van der Berg Servaas Prof & Van Aardt Carl Prof 'Breaking the grip of poverty and inequality in South Africa 2004 – 2014 Current trends, issues and future policy considerations' (December 2003) accessed at <http://www.sarpn.org/documents/d0000649/> (21 April 2013).

⁴⁶⁸ Section 186(2) of the LRA.

⁴⁶⁹ See also Grogan *Employment Rights* (2010) at 119 – 120.

⁴⁷⁰ *Transnet Ltd v CCMA & others* (2001) 22 ILJ 1193 (LC) at 1200I – 1201A.

⁴⁷¹ Geldenhuys Judith 'Reasonable expectations: Real protection or false security for fixed-term employees?' (2008) 20 Issue 2 *SA Merc Law J* 268 at 271 - 272.

1.6 The right to access to information

Section 32 of the Constitution provides the right to access information needed for the protection of one's rights.⁴⁷² The Government is obliged to enact supporting national legislation to give effect to this right and to see to its proper enforcement.⁴⁷³ The Promotion of Access to Information Act⁴⁷⁴ (PAIA) was legislated to give effect to the constitutional right to access information.⁴⁷⁵ In terms of the PAIA, information held by the State or any other person that is required for the exercise and protection of a person's rights,⁴⁷⁶ may be requested.⁴⁷⁷ Although the PAIA does not provide an absolute right to all information,⁴⁷⁸ a person is in principle entitled to claim access to information required to protect or exercise his or her rights.⁴⁷⁹ Access to required information can only be denied by public or private bodies if the PAIA expressly provides for the possible withholding of the information.⁴⁸⁰

This right is pertinent to dismissals of fixed term employees, since they may require information to prove that they had been unfairly dismissed. Such information may be accessed through the mechanisms provided for in the PAIA. Therefore it is unnecessary for new legislative provisions to provide for other methods of gaining access to information.⁴⁸¹

⁴⁷² Section 32(1)(a) and (b) of the Constitution.

⁴⁷³ Section 32(2) of the Constitution.

⁴⁷⁴ The Promotion of Access to Information Act 2 of 2000 (PAIA).

⁴⁷⁵ See the preamble to the PAIA.

⁴⁷⁶ The meaning of 'required' in the context of access to information was considered in *Shabalala v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 642C – D. It was held that the word was capable of different interpretations ranging from desired to indispensable. The Court held that an element of need must be present. In *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 299D – 300F the Court found that 'required' must be interpreted in relation to the exercise or protection of rights.

⁴⁷⁷ Section 50 of the PAIA.

⁴⁷⁸ Chapter 4 of Part 3 of the PAIA which regulates access to information held by private bodies excludes access to certain types of information.

⁴⁷⁹ Section 50(1)(a) of the PAIA. See also De Waal, Currie & Erasmus *The Bill of Rights Handbook* at 465.

⁴⁸⁰ Section 50(1)(c) of the PAIA.

⁴⁸¹ This is pertinent in respect of the discussion regarding the enforcement of the mechanisms contained in the Labour Relations Amendment Bill of 2012. See the discussion in Ch 6.

1.7 The right to fair administrative procedure

Section 33 of the Constitution provides that every person is entitled to fair administrative procedure. This right applies to fixed term employees in both the private and public sectors.

Apart from the Constitution, there are three sources that mainly regulate public service employment, namely the common law contract of employment, labour legislation and the Promotion of Administrative Justice Act⁴⁸² (PAJA).

In terms of s 1 of the PAJA 'administrative action' is defined as:

'...any decision taken or any failure to take a decision, by -

(a) an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct external legal effect.'

The PAJA requires fair administrative action in as far as public sector employees are concerned. Fixed term employees will be covered by such a provision. Consequently, administrative action which has the potential of materially and adversely affecting the rights or legitimate expectations of a fixed term employees in the public sector, must be done in a way which is procedurally fair.⁴⁸³

The fact that the Constitution already guarantees the right which is protected in terms of the PAJA has the effect of extending jurisdiction to the Labour Courts to hear labour disputes which would previously have been restricted to the civil court's jurisdiction.⁴⁸⁴ However, different courts have come to different conclusions regarding which forum is the most appropriate to deal with employment related cases pertaining to public sector employees.⁴⁸⁵

⁴⁸² Promotion of Administrative Justice Act 2 of 2000 (PAJA).

⁴⁸³ Section 3(1) of the PAJA.

⁴⁸⁴ See for instance *Key Delta v Mariner* [1998] 6 BLLR 647 (E) at 651 – 652. *Fredericks & others v MEC for Education and Training, Eastern Cape* (2002) 23 ILJ 81 (CC) at paras 12 & 25 *et seq.*

⁴⁸⁵ See for instance *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* [2006] 4 BLLR 385 (E) at paras 35 – 44 and *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at paras

This fundamental right, together with the right to fair labour practices,⁴⁸⁶ places a duty on employers to follow fair procedures in the selection process, when appointing fixed term employees and during the process of termination of a fixed term contract of employment.

1.8 Limitation of constitutional rights

Any limitations of the rights that are contained in the Bill of Rights⁴⁸⁷ must be justified under the limitation clause.⁴⁸⁸ All the rights discussed above can be limited, but only if and to the extent that it is justified to do so.⁴⁸⁹

The general limitation clause makes it possible to restrict fundamental rights if it is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Before a fundamental right may be restricted there must be a compelling reason for the limitation of the right.⁴⁹⁰ In deciding whether or not it is justifiable to restrict a fundamental right, the courts are obliged to consider all the relevant factors including, the nature of the right, the importance and motivation for the inclusion of such a right, the aim to be achieved through limitation of the right, the extent of restriction of the right that will be effected by the intended action, the existence of an alternative way that is a less restrictive way of achieving the same result.⁴⁹¹ No fundamental right may be limited by any other means than through the mechanism provided for in the Constitution.⁴⁹² The Constitution determines that the Bill of Rights as such does not limit any other common law, customary or legislative rights or freedoms that are consistent with the Bill that persons may enjoy.⁴⁹³

The limitation clause as contained in the Constitution is of particular pertinence when interpreting and applying the LRA which was enacted to give effect to the right to fair

58 - 65. For a contrasting view see *Fredericks & others v MEC for Education & Training, Eastern Cape & others* [2002] 2 BLLR 119 (CC) at para 40. See also the discussion in 4.2.1 in Ch 4.

⁴⁸⁶ Section 23 of the Constitution.

⁴⁸⁷ Chapter 2 of the Constitution.

⁴⁸⁸ Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA: A Response to Halton Cheadle's Concept Paper' (Development Policy Research 2007) at 3 & 7.

⁴⁸⁹ Section 36(1) of the Constitution contains the general limitation clause that applies to all rights granted in terms of Ch 2 of the Constitution.

⁴⁹⁰ *S v Manamela* 2000 (3) SA 1 (CC) at para 32.

⁴⁹¹ Section 36(1)(a) – (e) of the Constitution paraphrased.

⁴⁹² Section 36(2) of the Constitution.

labour practices.⁴⁹⁴ A decision of the court that has the effect of restricting a fixed term employee's constitutional right would be required to meet the requirements of s 36 of the Constitution.⁴⁹⁵ It is also of importance in as far as the formulation of new legislation is concerned. Legislation cannot infringe upon the constitutional rights or restrict rights unless it is done in terms of the Constitution.⁴⁹⁶

Concluding remarks

In this chapter, the most important legislation that affects termination of fixed term employment was highlighted. It was indicated that fixed term employees are in principle entitled to the same rights as indefinitely appointed employees. Fixed term employees are not excluded as a group from the application of any of the various pieces of labour and social security legislation.⁴⁹⁷

But, although the same test is used to ascertain whether or not a fixed term employee qualifies as an 'employee' is the same one used for purposes of indefinitely appointed employees, it may be easier for employers to disguise a fixed term contract as some other type of commercial contract.⁴⁹⁸

The fundamental right to fair labour practices is guaranteed in the South African Constitution.⁴⁹⁹ This right has a very wide scope of application and does not depend upon the existence of a valid employment contract. The protection of job security is not an absolute right. Since the right to fair labour practices also applies to employers, the courts are reluctant to interfere with employers' business decisions. Although it is acknowledged that the right not to be unfairly dismissed (and hence the right to job security) is firmly entrenched in the constitutional right to fair labour practices, the fundamental right requires balancing of the interests of employers and employees.⁵⁰⁰ All of the rights contained in the Bill of Rights may be limited. This is only possible in

⁴⁹³ Section 39(3) of the Constitution.

⁴⁹⁴ See the preamble to the LRA which expressly states that this is the purpose of the legislation.

⁴⁹⁵ Sections 2, 36(2) & 39(3) of the Constitution.

⁴⁹⁶ Section 36(2) of the Constitution.

⁴⁹⁷ See the discussion under 1.1 above.

⁴⁹⁸ This is discussed under 1.1.

⁴⁹⁹ See the discussion under 1.2.

⁵⁰⁰ This is discussed under 1.2.2 above.

instances where the court can justify the necessity of restricting the Constitutional Right in terms of s 36 of the Constitution.⁵⁰¹

A distinction is made between indefinitely appointed employees and fixed term employees in the statutory dismissal protection that they are provided with. Although it is conceivable that a fixed term employee could use the same remedy, they are required to rely upon a separate provision.⁵⁰²

The concept 'unfair labour practice' in the LRA has a more limited scope of application than the constitutional right. Only specific instances of conduct are identified as conduct which could potentially qualify as unfair labour practices. The intrinsic limitations in the unfair labour practice provision in the LRA may exclude its availability if the circumstances do not fall within the confines of the definition. Whereas, under the previous unfair dismissal provision, it may have been possible for fixed term employees to successfully claim based on unfair labour practice instead of unfair dismissal, the restrictive definition of this concept now minimalises the possibility.⁵⁰³

The Constitution guarantees the right to freely associate to all workers. Fixed term employees in principle enjoy this right. But, they are often not recruited into trade unions due to the precarious or temporary nature of their work. Collective agreements often do not cover them.⁵⁰⁴

The BCEA provides wide coverage and in principle does not exclude fixed term employees from the protection that it provides. Nevertheless, enforcement of the rights is often a problem for fixed term employees. Those who are paid an hourly wage forfeit payments if they do not work for legitimate reasons when indefinitely appointed employees would usually be paid. Generally, fixed term appointments terminate automatically and fixed term employees are not entitled to notice prior to termination of their employment or payment in lieu of notice like permanent employees. Even in instances where fixed term employees are dismissed for operational reasons, they are often not afforded additional severance pay.⁵⁰⁵

⁵⁰¹ This is discussed under 1.8 above.

⁵⁰² See the discussion under 1.2.2.

⁵⁰³ See the discussion under 1.2.1 above. See also the discussion in Ch 3 under 3.1.1, 3.1.2 and 3.1.3.

⁵⁰⁴ This is discussed in 1.2.3 above.

⁵⁰⁵ See the discussion under 1.5.2.1.

Fixed term employees, like permanent employees, have the right to work in a safe and healthy workplace. Segmentation of the workplace has resulted in inefficiency of health and safety training that is provided to workers. Fixed term employees are particularly vulnerable. They are viewed as contingent workers and are at a higher risk of not being afforded the required training. Hence, they are more exposed to risks to their health and safety.⁵⁰⁶

Fixed term employees must also be registered and employers are required to contribute for fixed term employees' unemployment insurance like for other employees. However, the benefits which fixed term employees can claim during spells of unemployment are limited. In addition, a fixed term employee who reasonable expects to continue working for an employer would usually not claim UIF as a consequence of the expectation of continuation of his or her employment.⁵⁰⁷

South Africa's under-developed social insurance provisions fail to adequately provide for atypical employees. There is no mandatory retirement and health provision scheme in the country. Social security mechanisms do not have universal coverage either. This has a particularly negative effect on fixed term employees who are not covered by collective bargaining mechanisms and do not have access to pension and medical aid benefits.⁵⁰⁸

The South African legislation that was enacted against unfair discrimination is aimed at addressing systemic disadvantage as a result of past unequal treatment. The equality legislation lists specific grounds which would potentially qualify as being unfair. No reference is made to equal treatment or equal pay in any of the equality legislation. Discrimination based on contractual status is also not explicitly prohibited. A claimant who relies on one of these analogous grounds would be required to prove that his or her dignity had been infringed upon as a result of the discrimination.⁵⁰⁹

The PEPUDA contains a stipulation regarding equal pay and recognises an employer's failure to ensure that employees who perform work of equal value are paid equally as a potential unfair labour practice. But, the PEPUDA is not applicable where the EEA is

⁵⁰⁶ This is discussed under 1.2.6.1 above.

⁵⁰⁷ See the discussion under 1.2.6.2 above. See also the discussion in Ch 3 under 3.2.3.10.

⁵⁰⁸ This is discussed under 1.2.6.

⁵⁰⁹ This is discussed in 1.3.1 – 1.3.3.

capable of providing protection. This remedy therefore serves very little, if any, purpose in the employment arena. The effect is that South Africa's equality legislation does not currently provide for a right to equal treatment that is directly justiciable unless a claimant can prove that there is a link between the discrimination and one of the listed grounds in s 6 of the EEA.⁵¹⁰

Fixed term employees are often not provided with training. This is understandable if a fixed term employee is only appointed for a short period of time to fill in for someone or to perform a specific task of limited duration for which he or she has already received the required training. It is clear that to impose a general duty to provide training to all employees would be contrary to the operational rationale for the conclusion of a fixed term contract in certain circumstances. But, in instances where fixed term employees are kept in a temporary position where the nature of work which they are required to perform resembles or better suits a permanent appointment, withholding equal training would be unfair.⁵¹¹

It is evident that fixed term employees are in principle entitled to the same legislative floor rights as indefinitely appointed employees. Fixed term employees are covered by the Constitution in the same way as permanently appointed employees. They enjoy the rights to social security, protection against unfair dismissal and unfair labour practices. However, whether and if so, to what extent these rights are enforceable in practice is to a large degree determined by the way in which they have been understood and given effect to by employers and labour forums. In the next chapter some important common law principles applicable to fixed term employment and ultimately the termination of fixed term contracts is investigated.

⁵¹⁰ This is discussed under 1.3.

⁵¹¹ This is discussed under 1.5 above.

Contractual rights of fixed term employees

2

Introduction

In order to properly understand the need for and the effect of legislative interventions, an understanding of the contractual principles applicable to fixed term contracts of employment is paramount.⁵¹² Despite statutory intrusion and the creation of forums subjecting the employment relationship to judicial scrutiny, the contract of employment remains the basis of the employment relationship.⁵¹³ The possession of status as an 'employee' is not the only means of enforcement of fixed term employees' rights. In certain circumstances the termination of fixed term contracts can escape the protective reach of unfair dismissal legislation. In such circumstances, the law of contract must fill the legislative lacunae.⁵¹⁴ If statutory regulation is perceived as weak, workers often turn to contractual remedies to protect job security.⁵¹⁵ In addition, the courts often apply contractual principles when reaching decisions based on the legislation. A right to recourse, for instance, is often connected to whether or not a contractual breach had occurred given the factual circumstances.⁵¹⁶

In terms of the common law, fixed term contracts of employment automatically terminate in accordance with the agreement between the parties. However, the evolutionary nature of employment is acknowledged by the courts.⁵¹⁷ Employment contracts are

⁵¹² Anderman *SD Labour Law: Management decisions and workers' rights* 4th edn (Oxford: OUP 2000) at 36.

⁵¹³ Grogan *Employment Rights* (2010) at 43. Vettori 'Constructive Dismissal and Repudiation of Contract: What must be proved' *Stell LR* Vol. 22 (1) 2011 173 at 173. O Kahn-Freund 'A Note on the Status of Contract in British Law' (1951) 14 *MLR* 504 at 635. See also *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others* (2009) 30 ILJ 2093 (LC) at para 49 and in particular endnote 6 thereof.

⁵¹⁴ See for instance *Mears v Safecar Security Ltd* [1982] 2 All ER 865.

⁵¹⁵ Painter & Holmes *Cases and Materials on Employment Law* (2010) at 51.

⁵¹⁶ Vettori Stella 'Fixed Term Employment Contracts: The Permanence of the Temporary' *STELL LR* 2008 (2) 189 at 190 *et seq.*

⁵¹⁷ Vettori Stella 'Fixed Term Employment Contracts: The Permanence of the Temporary' *STELL LR* 2008 (2) 189 at 190 *et seq.*

recognised as personal, relational contracts that evolve over time and require cooperation between the parties thereto to give effect to the agreement.⁵¹⁸ Since the relationship is not stagnant, the obligations and expectations that the parties have may change after conclusion of the contract. It is possible that the intention of the parties as it was confined in the agreement does not reflect the full extent of such obligations and expectations. What may start off as fixed term appointment may, as a result of changing needs of the employer, change into an indefinite appointment. Under certain circumstances the courts will imply terms into the contracts in the interest of fairness⁵¹⁹ or to stop employers from denying liability for performance in terms of fixed term contracts.⁵²⁰

The contractual remedies are basically the same as the statutory remedies that are provided to fixed term employees in terms of the legislation, except that there is no maximum compensation amount in terms of the common law. The difficulties in proving an entitlement to remedies are often common to both the common law provisions and the statutory mechanisms.⁵²¹

The terms of the fixed term appointment are determined by consensus between the parties. Contracting parties are generally bound to agreements that they conclude voluntarily.⁵²² The common law relating to contracts is therefore often considered as prevailing over the legislative protection provided to all employees. As a result legal principles dealing with working conditions are largely ignored.

The scarceness of work and resultant vulnerability⁵²³ makes it much easier to convince fixed term employees to accept offers of and to remain in employment on less attractive terms. It is labour legislation that is supposed to bring consideration of fairness into the rather bleak picture.⁵²⁴

⁵¹⁸ In the English case of *Mahmud and Malik v BCCI* [1997] ICR 606 at 613E Lord Nicholls describes employment contracts as mechanisms creating close personal relationships which extends beyond mere commercial relationships. See also *Wallace v United Growers* (1997)152 DLR (4) 1 at 46.

⁵¹⁹ This is discussed under 2.2 – 2.6 in this chapter.

⁵²⁰ The doctrine of estoppel may be applied in certain circumstances. This is discussed further under 2.6 in this chapter.

⁵²¹ Vettori Stella 'Fixed term employment contracts: the permanence of the temporary' 2008 (2) *Stell LR* 189 at 190 *et seq.*

⁵²² See the discussion under 2.7 below.

⁵²³ See the discussion under 2 in Setting the scene.

⁵²⁴ *SARPA obo Bands & others and SA Rugby (Pty) Ltd* (2005) 26 ILJ 176 (CCMA) at 190.

2.1 Automatic termination of fixed term contracts

At common law a fixed term contract that indicates a particular time or the occurrence of a particular event or the completion of a specific job for termination will terminate automatically at that time or upon the happening of the event or the completion of the job without legal consequence. Such a fixed term contract will then be terminated lawfully.⁵²⁵

A clause may be incorporated into a fixed term contract of employment rendering it renewable at the option of the employer. Usually such a clause would be accompanied by a termination clause regulating the termination procedure. Unless the parties to the contract agreed otherwise, no notice of termination is required.⁵²⁶ An employer may rely on the agreed upon date or the happening of the specified event in the contract to terminate the employment relationship.⁵²⁷

The rationale for the existence of fixed term contracts is founded on the right to contract freely and the creation of predictability and control of the term of the employment relationship.⁵²⁸ The right to contract freely presupposes the validity of an agreement between an employer and employee on any terms which they find to be mutually acceptable.⁵²⁹

Common law contractual provisions do not adequately provide for fairness in dismissal.⁵³⁰ As long as it is not unconstitutional or contrary to public policy, a fixed term

⁵²⁵ Grogan *Workplace Law* (2010) at 148. In *Potgieter v George Municipality* (2011) 32 ILJ 104 (WCC) the termination of the fixed term contract was for instance linked to the term of office of the mayor. When the term of the mayor's appointment lapsed, the fixed term employee's employment also automatically terminated. See also *Maritz v Cash Towing CC* (2002) 23 ILJ 1083 (CCMA) at paras 14 - 15 and *Ndaba v Board of Trustees, Norwood Pre-school* (1996) 17 ILJ 504 (Tk) at 509.

⁵²⁶ Olivier M 'Legal Constraints on the Termination of Fixed term Contracts of Employment: An Enquiry into Recent Developments' at 1013 – 1014.

⁵²⁷ Olivier M 'Legal Constraints on the Termination of Fixed Term Contracts of Employment' at 1010 – 1014. A fixed term appointment could for instance also be linked to the term of the appointment of a functionary, like in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 36.

⁵²⁸ Gericke 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment' at 1.

⁵²⁹ *Paiges v Van Ryn Gold Mines Estates* 1920 AD 600 at 616.

⁵³⁰ Wallace Malcolm 'The LRA and the Common Law' Paper delivered at a conference on Labour Law held at the University of Stellenbosch in 2005.

contract may be terminated at common law for any or no reason.⁵³¹ Without proper interventions, it would be possible for employers to keep their employees on fixed term contracts and terminate such appointments in the absence of fair reason and without following fair procedures.⁵³² The law of contract also fails to recognise the unequal bargaining power between employers and employees. In principle, fixed term employees are bound to contracts concluded by them voluntarily on any terms, unless the conditions of employment are contrary to public policy of course.⁵³³

The duty of good faith is an important characteristic of each contract of employment.⁵³⁴ Due to the fact that employment relationships often evolve, this principle should guide the courts when inferring terms into contracts. This important contractual principle is discussed below.

2.2 Mutual trust and confidence

At common law there exists a duty of trust and confidence between an employer and employee.⁵³⁵ This is a *naturalia* of every employment contract. An employer is obliged to treat employees fairly during the appointment process, in the course of employment and upon (and even after) termination of the fixed term contract. Every action must be proven to have been without bias and untainted by discrimination.⁵³⁶

⁵³¹ Borat & Cheadle 'Labour Reform in South Africa and a Synthesis of Policy Suggestions' DPRU Working Paper 09/139 (September 2009) at 23.

⁵³² Grogan *Workplace Law* (2009) at 148 – 149. In *Dierks v University of South Africa* at 1244D – I and 1248H – J Oosthuizen AJ with reference to *Cremerk a division of Triple P - Chemical Ventures (Pty) Ltd v SACWU & others* (1994) 15 ILJ 289 (LAC) and *Colavita v Sun International Bophuthatswana* [1995] BLLR 88 (IC) held that the reason for the inclusion of s 186(1)(b) of the LRA is largely premised on the blatant unfairness of indefinite renewals of fixed term employment contracts. See also *Khalo v Bateman Pipeline* (1998) 19 ILJ 1288 (CCMA) at 1288B.

⁵³³ See the English case of *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 where it is held that '[i]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice.'

⁵³⁴ *Gerry Boucher Motors (Pty) Ltd v Preller* 1940 TPD 130 at 133. See also *Premier Medical & Industrial Equipment Ltd v Winkler & others* 1971 (3) SA 866 (W) at 867H.

⁵³⁵ *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 20 B – D.

⁵³⁶ This is also a constitutional right. Section 33 of the Constitution provides that everyone enjoys the right to lawful, reasonable and procedurally fair administrative action.

In England the duty of mutual trust and confidence is implied into every contract of employment.⁵³⁷ In Australia, it is also accepted that employers are by implication obliged to uphold the trust and confidence between them and their employees.⁵³⁸

In *Perkins v Grace Worldwide (Aust) Pty Ltd*⁵³⁹ Wilcox CJ, Marshall & North JJ agreed that mutual trust and confidence is a necessary component of an employment relationship and is part of every employment contract. In *Thomson v Orica Australia (Pty) Ltd*⁵⁴⁰ it was held that 'there is ample authority for the implication of the term that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee.'⁵⁴¹

Through imputing terms into employment contracts, the duty of fair dealing and obligation of mutual trust and confidence⁵⁴² have also become *naturalia* of the South African employment relationship.⁵⁴³ In *Council for Scientific & Industrial Research v Fijen*⁵⁴⁴ the court stressed the importance of trust and confidence in the employment relationship. It was held that if either party conducts him or herself in a way which undermines the trust and confidence of the other, the 'innocent' party would be entitled to cancel the contract.⁵⁴⁵ This, in the court's view, is a natural consequence of an employment relationship and therefore not a term that needs to be implied.⁵⁴⁶

Likewise, Davis J in *Mort NO v Henry Shields-Chiat*⁵⁴⁷ held that contracting parties are obliged to uphold mutual respect and to avoid promotion of their personal interests at

⁵³⁷ In *Scally v Southern Health and Social Services Board* [1991] IRLR (HL) 522 at 525 this notion is described by Lord Bridge as that 'which the law will imply as a necessary incident of a definable category of contractual relationship.' See also Hutchison 'Evolution, Consistency and Community: The Political, Social and Economic Assumptions that Govern the Incorporation of Terms in British Employment Contracts' (2000) 25 *North Carolina Journal of International Law and Commercial Regulation* 355 at 359.

⁵³⁸ See for instance *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR at 144 and *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186 at 191.

⁵³⁹ *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186.

⁵⁴⁰ *Thomson v Orica Australia (Pty) Ltd* (2002) 116 IR 186.

⁵⁴¹ See also the English decision of *Mahmud and Malik v BCCI* [1997] ICR 606 at 621D where Lord Steyn endorses this sentiment.

⁵⁴² In the English case of *Mahmud and Malik v BCCI* [1997] ICR 606 at 621C Lord Steyn indicates that this duty is reciprocal between employers and employees.

⁵⁴³ Grogan *Employment Rights* (2010) at 5.

⁵⁴⁴ *Council for Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (A) at paras 17 - 18.

⁵⁴⁵ *Council for Scientific & Industrial Research v Fijen* at 691.

⁵⁴⁶ *Council for Scientific & Industrial Research v Fijen* at 692.

⁵⁴⁷ *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) 474J - 5F. This decision was cited with approval by Olivier JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para 69.

the other party's expense. The courts can infuse contract law with the constitutional values. There rests a duty on both the employer and the employee to deal fairly. Employees are required to act in good faith. In *Robinson v Randfontein Estates Gold Mining Co Ltd*⁵⁴⁸ the court held that the duty of trust and confidence involves an obligation to protect the other party's interests and to avoid a conflict of interest.

In *Mogothle v Premier of the Northwest Province & others*⁵⁴⁹ the court recognised the principle of fair dealing between employers and employees as a contractual obligation upon employers when making decisions that affect employees. Van Niekerk J held that *Boxer*,⁵⁵⁰ *Gumbi*⁵⁵¹ and *Murray v Minister of Defence*⁵⁵² highlight mutual obligation of trust and confidence.⁵⁵³ The contractual right to fair dealing binds all employers, may be enforced both in relation to substance and procedure and exists independently of any statutory protection. This duty goes beyond merely abiding the express terms of the contract. Part of this duty, is the duty to respect the legitimate expectations of the other party.⁵⁵⁴

Implied terms in contract play an important role in ensuring unfair dismissal protection for fixed term employees, despite the existence of statutory protection. The courts may imply a term into a contract even though it is not expressed therein.⁵⁵⁵ Therefore, fixed term employees are subject to certain general rights that form part of every employment contract. The courts will imply terms that constitute necessary elements to all employment contracts such as the right to fair dealing and terms to give effect to the right to mutual trust and confidence.⁵⁵⁶ This is discussed further below.

2.3 Implied terms

As mentioned above, obligations and expectations often evolve after a contract of employment is concluded. The employer's operational needs may change after

⁵⁴⁸ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177. See also *Volvo (SA) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA) at para 13.

⁵⁴⁹ *Mogothle v Premier of the Northwest Province & others* (2009) 30 ILJ 605 (LC) at 618 - 619.

⁵⁵⁰ *Boxer Superstores Mthatha & another v Mbenya* [2007] 8 BLLR 693 (SCA).

⁵⁵¹ *Old Mutual Life Assurance Co SA v Gumbi* [2007] 8 BALR 699 (SCA).

⁵⁵² *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) at para 5.

⁵⁵³ *Mogothle v Premier of the Northwest Province & others* at para 30.

⁵⁵⁴ *Mogothle v Premier of the Northwest Province & others* at paras 31 - 32.

⁵⁵⁵ *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137.

conclusion of the fixed term contract and/or the employee's expectations may adapt.⁵⁵⁷ Express terms may at times be inadequate to describe the true nature of the relationship. In such circumstances, implied terms may give expression to mutual obligations.

In terms of common law principles of contract, if two parties regularly conducted business on specific terms, the terms may be assumed to be the same for each contract made, if not expressly agreed to the contrary. It has for instance been held that regular renewal of a fixed term contract would indicate that the parties intended that the contractual relationship would continue.⁵⁵⁸

Continuous renewal of a fixed term contract may result in an expectation that the contract would continue to be renewed. After several renewals the employee would plausibly have a claim to have more than just a legitimate expectation that the contract will be renewed again after its term had lapsed for the same period. Depending on the surrounding circumstances, a claim could emanate to the effect that there exists an implied term that the employment will continue and even be made permanent. A fixed term employee would be required to prove that he or she subjectively believed, based on an objectively reasonable interpretation of the surrounding circumstances, that the contract would be renewed on the same or similar terms.⁵⁵⁹

Therefore, it is possible to argue that if a fixed term contract is continually renewed or rolled over, an initial expectation that the contract would be renewed, could become an implied term in the contract. If an employer expects a fixed term employee to do work other than what he or she was initially appointed for, or the employee expects continuance of his or her employment after the agreed upon termination date, it could also give rise to a contractual right. The habitual practices followed in renewing fixed term contracts may over time become more than expectations and evolve into a rule. It should then be possible for such an employee to claim the contractual remedies for breach of such an implied term in the contract.

⁵⁵⁶ *Lister Romford Ice Co* [1957] AC 555 at 576.

⁵⁵⁷ See the introduction and 1 above.

⁵⁵⁸ See for instance *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 27.

⁵⁵⁹ If no subjective belief can be proven or if there was no reasonable expectation of renewal, no dismissal will have occurred. See *Member of the Executive Council for the Department of Finance: Eastern Cape v De*

It has been held that a reasonable expectation vests in the employee and is subjective in nature. It is not necessary for the employer to share the expectation. But, if the facts do not show that the employee has a subjective expectation, he or she will have no claim in terms of s 186(1)(b) of the LRA.⁵⁶⁰ Having due regard to all the surrounding circumstances, the presiding officer must decide whether or not a reasonable person would have shared the fixed term employee's expectation of renewal. An objective test is used to determine whether or not an expectation of renewal is reasonable.⁵⁶¹

However, the courts do not enjoy general discretion to imply terms into a contract, unless they are based on the actual intention of the parties.⁵⁶² In order to determine what the parties to a contract intended upon its conclusion, the court may ignore provisions contained in the contract that as a result of fraud, mistake, or accident cause the contract to fail to express the true intention of the parties. It is therefore possible to rectify the terms of an agreement so that the contract would reflect the true intention of the parties. However, the court cannot write the contract for the employer and fixed term employee.⁵⁶³ Terms may also be implied into contracts on the basis that the parties would have included them had they considered the particular matter at the time of the conclusion of the contract.⁵⁶⁴

South African courts use the hypothetical officious bystander test to determine whether or not a term is implied in a contract.⁵⁶⁵ The question posed in an application of this

Milander & others (2011) 32 ILJ 2521 (LC) at paras 25 – 26, 32 & 35 for a further discussion regarding the application of the two-stage approach.

⁵⁶⁰ Olivier 'Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments' at 1030. See also *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 3.

⁵⁶¹ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 1246A and E. See also *Malandoh v SA Broadcasting Corporation* (1997) 18 ILJ 544 (LC) at 547D and *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 LC at paras 9 & 11. Landman 'The Legal Consequences of Not Renewing Fixed Term Contracts' *Contemporary Labour Law* Vol. 8 (March 1999) at 71 - 72. Notably the reasonable expectation must not only be viewed objectively, but the expectation must have resulted due to an act or omission by the employer.

⁵⁶² The intention of the parties is usually established by looking at the wording of the contract. Surrounding circumstances must also be considered. *Sun Packagings (Pty) Ltd & another v Vreulink* (1996) 17 ILJ 633 (A) at paras 13 - 14.

⁵⁶³ *Bitumat Limited & another v Paramount Motors (Private) Limited t/a Belleview Service Station & another* [2013] JOL 30229 (ZH) at 6.

⁵⁶⁴ Vettori Stella *The Employment Contract and the Changed World of Work* (2007) at 46. See also Kerr RH *The Principles of the Law of Contract* 6th edn (Butterworths 2002) at 356 - 359.

⁵⁶⁵ Kerr *The Principles of the Law of Contract* (2002) at 356. The test used is that of a hypothetical bystander or as sometimes described the officious bystander test. For further information regarding the application of the test in England see Lewis & Sargeant with Schwab *Employment Law: The Essentials* 11th edn (HR-Inform 2010) at 27 - 30.

test, is whether the parties to the contract would have responded to a hypothetical question they were asked alerting them of the current situation upon conclusion of the contract.⁵⁶⁶ Even if the parties did not contemplate such events when they entered into the contract, a common intention may be impugned if, had they been aware, their response would have been 'prompt and unanimous'.⁵⁶⁷ In other words, it should be obvious that the term is part of the contract. In execution of the officious bystander test parties to the contract are presumed to be reasonable and honest.⁵⁶⁸

The reasonable man test is used. However, this is not a clearly defined or stagnant concept. This test is further tainted by subjective considerations, such as the presiding officers' personal experience, preconceptions or opinions regarding public morals.⁵⁶⁹ The standard of reasonableness is intended to assist in a balanced interpretation of contracts, the endowment of business efficacy and giving effect to the reasonable expectations of the contracting parties.⁵⁷⁰ Contractual provisions are only enforceable if it makes commercial sense or has business efficacy.⁵⁷¹

Before a term will be implied into a fixed term employment contract, it must be proven to be necessary to give effect to the intention of the parties and capable of precise definition.⁵⁷² In *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc: The Reborn*⁵⁷³ Lord Clarke MR emphasised that the main enquiry remains whether it is necessary to imply the proposed term to promote the efficiency of the contract. If a fixed term employee was appointed to replace someone during a leave of absence, there would generally be no need to keep him or her on if the person who

⁵⁶⁶ *Administrator (Transvaal) v Industrial Commercial Timber & Supply Co* 1932 AD 25 at 33. Wessels ACJ stated that the court may disregard an assertion that an employer who did contemplate a situation purposefully failed to expressly include a term in the contract to avoid such a term being implied. The court has to ascertain from the facts what a reasonable and honest person would have done and not what a dishonest person would have done. This is done from the point of view that the contracting parties are both reasonable and honest business men and or women.

⁵⁶⁷ *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236H - 237A.

⁵⁶⁸ *Administrateur (Transvaal) v Industrial Commercial Timber & Supply Co Ltd* 1932 AD 25. See also *Wilkins NO v Vogens* 1994 (3) SA 130 (A) at 141C - E.

⁵⁶⁹ As was correctly observed by Lord Ratcliffe in *Davis Contractors v Fareham UDC* [1956] AC 696 at 728 '[t]he spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself.'

⁵⁷⁰ See generally *Van den Berg v Tenner* 1975 (2) SA 268 (A).

⁵⁷¹ *Dula Investments (Pty) Ltd v Woolworths (Pty) Ltd* (1994/2013) [2013] ZAKZDHC 17 (8 May 2013) at para 37. See also *ABSA Bank Limited v Swanepoel NO* 2004 (6) SA 178 (SCA) paras 6 – 8 and *Siyepu & others v Premier Eastern Cape* 2013 (2) SA 425 ECB at paras 23 & 35.

⁵⁷² *MV Prosperous Coban NV v Agean Petroleum (UK) Ltd & another* 1966 (2) SA 155 (A) at 163G - H.

he or she was appointed to replace returns. Likewise, if a fixed term employee is employed to complete a specific task, there would be no reason to keep him or her on in the workplace once the task has been completed. In these circumstances, a fixed term employee would be hard-pressed to claim any type of legal entitlement to have the fixed term contract renewed.

However, a fixed term employee's appointment could continue beyond the date that was originally contracted, if the person who he or she had been replacing remains absent, or if the task he or she is appointed for is not yet completed. For efficacy, it would be sensible to renew the fixed term contract for a further specified period of time under these circumstances.⁵⁷⁴ *Kauleza & others and Bay United Football Club*⁵⁷⁵ serves as an example. In this case, football players were contracted to play for a club until 30 June 2011. The club failed to pay the players for August 2011. It was held that this amounted to a breach of contract entitling the players to terminate the agreement and claim damages. This decision makes it clear that despite the lack of a written contract, terms can be implied to provide efficacy to the agreement.

Implied terms can provide terms for specific situations which have not been addressed by the contracting parties during the drafting of the agreement. The Privy Council in *Attorney General of Belize & others v Belize Telecom Ltd & another*⁵⁷⁶ per Lord Hoffmann, held that a court faced with a proposed implied term simply needs to ask what the instrument would reasonably mean when it is read against the relevant background.⁵⁷⁷ Lord Hoffmann acknowledged the fact that a contract does not always reflect the intention of the parties.⁵⁷⁸ He noted that other formulations of the test like the implication of a term that goes without saying or that an implied term must be necessary in order to give business efficacy to the agreement,⁵⁷⁹ were just different ways of

⁵⁷³ *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc: The Reborn* [2009] EWCA Civ 531.

⁵⁷⁴ It should be noted that whether or not such a tacit term would be inferred, still depends on the particular facts of the matter. In *Dierks v University of South Africa* the court for instance held that the employee could not have expected to remain employed despite the fact that the person for whom he was filling in had not yet returned to work.

⁵⁷⁵ *Kauleza & others and Bay United Football Club* (2011) 32 ILJ 3091 (ARB) at 3095.

⁵⁷⁶ *Attorney General of Belize & others v Belize Telecom Ltd & another* [2009] UKPC 10 [2009] All ER (D) 150 (Apr).

⁵⁷⁷ *Attorney General of Belize & others v Belize Telecom Ltd & another* at para 21.

⁵⁷⁸ *Attorney General of Belize & others v Belize Telecom Ltd & another* at para 16. This was first decided in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)* [1998] 1 WLR 896.

⁵⁷⁹ *United Bank v Akhtar* (1989) IRLR 507.

expressing the same test. Ultimately, implied terms have to convey the intention of the parties and make it clear 'what the contract actually means'.⁵⁸⁰

A term may also be implied through operation of law or derived from the Constitution.⁵⁸¹ In *Mohlaka v Minister of Finance & others*,⁵⁸² for instance, it was held that the LRA 'imputes the right to fair labour practices as a term of every contract of employment.' A fixed term employee may be entitled to a contractual right to fair dismissal if the employer's disciplinary procedure had been incorporated into his or her contract of employment.⁵⁸³ He or she may also enjoy such a contractual right if there is a tacit term that incorporates the disciplinary procedure into the contract.⁵⁸⁴

2.4 Tacit renewal of fixed term contracts

Provisions may be tacitly inferred in a fixed term contract. A tacit term is a provision that is not expressed in a contract, but is clearly intended by the contracting parties from the express terms of the agreement and the surrounding circumstances.⁵⁸⁵

Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*⁵⁸⁶ held that a tacit term is not easily incorporated into a contract. The courts are not allowed to create contracts or to supplement agreements that have been concluded based on the fact that it would be reasonable. A court needs to be convinced after consideration of the contractual terms and the surrounding circumstances that the contracting parties intended to agree on the proposed term.

A fixed term contract would be considered as being tacitly concluded if the employer and the employee agreed on the material terms of the engagement⁵⁸⁷ and the employee has commenced with work. Fixed term contracts may also be tacitly renewed by the

⁵⁸⁰ *Attorney General of Belize & others v Belize Telecom Ltd & another* at para 27.

⁵⁸¹ *Fedlife Assurance Limited v Wolfaardt* [2001] 12 BLLR 1301 (SCA) at para 15.

⁵⁸² *Mohlaka v Minister of Finance & others* (2009) 30 ILJ 622 (LC) at para 19.

⁵⁸³ *Denel (Pty) Ltd v Vorster* at para 16.

⁵⁸⁴ *Harper v Morgan Guarantee Trust Company of New York, Johannesburg & another* 2004 (3) SA 253 (W).

⁵⁸⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531. See also *SA Maritime Safety v McKenzie* (2010) 31 ILJ 529 (SCA) at paras 11 - 12 in which the differentiation between tacit terms and implied terms is explained.

⁵⁸⁶ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* at 532H - 533A.

⁵⁸⁷ It is not required that consensus be reached on each and every point of the agreement. *Southgate Blue IQ Investment Holding* at para 35.

parties.⁵⁸⁸ The contract is then renewed upon the same terms and for the same period as the original contract. Should a fixed term contract be renewed frequently, without specification that the renewal will be for a specific period, it becomes one for an indefinite period.⁵⁸⁹

If the employer continues paying a fixed term employee for his or her services and the employee continues working after the termination date the employment contract is deemed to have been tacitly renewed.⁵⁹⁰ Basson J expressed the possibility for the court to infer an intention of renewal of a fixed term employment contract. She held that if an employer promises either expressly or through its conduct that the fixed term contract will be renewed, the fixed term employee could be in a position to prove that such an entitlement should be inferred.⁵⁹¹

Under certain circumstances, a term may be imported into a contract of employment based on a reasonable expectation.⁵⁹² If an employer created a reasonable expectation in the fixed term employee's mind that his or her contract would continue, a tacit undertaking of renewal may be implied into the contract. The expectation created by the employer, may result either from a verbal undertaking⁵⁹³ or through the employer's conduct. In order to ascertain whether or not an employer's conduct constitutes a tacit term, the ordinary custom and practice in the workplace are important considerations.⁵⁹⁴ If there is a tradition in the workplace to appoint fixed term employees continually with the fixed term employee commencing work before the formal renewal, a fixed term employee may base a claim on the fact that renewal is tacitly inferred. In addition, if the workplace follows the custom of appointing fixed term employees permanently after a

⁵⁸⁸ *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 536 (IC) at 574A - D. This is also possible at common law. In this regard see *Braund v Baker & Co* 19 EDC 54.

⁵⁸⁹ Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (Juta 1994) 64 - 5. See also *Hlatswayo & Kwadukuza Municipality* (2012) 33 ILJ 2721 (BCA) at para 5.32, *Elundini Municipality v SALGBC & others* [2011] 12 BLLR 1193 (LC) at para 21 and *NEHAWU obo Tati & SA Local Government Association* (2008) 29 ILJ 1777 at 1783.

⁵⁹⁰ *Redman v Colbeck* 1917 EDL 35 at 38. See also *Owen & others v Department of Health KwaZulu-Natal* (2009) 30 ILJ 2461 (LC) at 2465 – 2466 and *NEHAWU obo Tati and SA Local Government Association* at 1783 - 1784.

⁵⁹¹ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at para 17.

⁵⁹² Vorster Jacob 'The Bases for the Implication of Contractual Terms' (1998) *TSAR* Vol. 2 at 161.

⁵⁹³ Grogan *Workplace Law* (2010) at 149. See also Vettori *The Employment Contract and the Changed World of Work* (2007) at 90 – 96 for an in-depth discussion of promises made by employers as a source of implied terms.

⁵⁹⁴ See Vettori *The Employment Contract and the Changed World of Work* (2007) at 55 – 58 for a discussion of custom and trade usage as bases for the implication of terms.

certain period of time, it could be argued that not appointing a fixed term employee after such time would be a breach of a tacit agreement.

2.5 Legitimate or ‘reasonable expectation’

The concept ‘legitimate’ or ‘reasonable expectation’⁵⁹⁵ originated in England⁵⁹⁶ and was adopted into South African law.⁵⁹⁷ The original concept was utilised within the realm of administrative law. In essence the original notion was concerned with instances in which an administrative body could be required to provide a person with an opportunity to be heard in cases where the person could prove a right, interest or legitimate expectation of being afforded such an opportunity.

The English courts have developed the original concept of natural justice into a process of imposing a duty upon decision makers. The doctrine of legitimate expectation in England is therefore an aspect of the ‘duty to act fairly.’ In *Breen v Amalgamated Engineering Union (now Amalgamated Engineering & Foundry Workers Union) & others*⁵⁹⁸ Lord Denning MR in his dissenting judgment opined that a statutory body that is afforded discretion through legislation must act fairly and provide a party an opportunity to be heard if the circumstances call for it. If a person’s property or his or her livelihood is at stake, reasons should be provided for conduct affecting him or her negatively. Likewise, if he or she has some interest or a legitimate expectation, he or she should be provided with reasons for the decision which has a detrimental effect.⁵⁹⁹

The doctrine of legitimate expectation concerns the achievement of fairness.⁶⁰⁰ A reasonable expectation has been acknowledged as ‘a principle of equity falling short of a right.’⁶⁰¹ Froneman J in *Foster v Stewart Scott Inc*⁶⁰² described ‘reasonable

⁵⁹⁵ In *Council of Civil Service Unions* [1984] 3 All ER 935 at 954G Lord Roskill indicated that the phrases ‘reasonable expectation’ and ‘legitimate expectation’ has the same meaning.

⁵⁹⁶ *Schmidt & another v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA) at 909C and F.

⁵⁹⁷ *Administrator, Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 756G.

⁵⁹⁸ *Breen v Amalgamated Engineering Union (now Amalgamated Engineering & Foundry Workers Union) & others* [1971] 1 All ER 1148 (CA) at 1153H - J.

⁵⁹⁹ *Breen v Amalgamated Engineering Union (now Amalgamated Engineering & Foundry Workers Union) & others* at 1154F - H.

⁶⁰⁰ *Gemi v Minister of Justice, Transkei* 1993 (2) SA 276 (Tk) at 288 - 290.

⁶⁰¹ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 1247I. Olivier ‘Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments’ at 1023. See also *Administrator of the Transvaal & others v Traub* (1989) 10 ILJ 823 (A) at 840A - J.

expectation' as the best and most flexible measure that could be formulated to service the unfair labour practice jurisdiction because of the array of possible factual circumstances which may present itself. Section 186(1)(b) of the LRA clearly seeks to address the situation where an employer fails to renew fixed term employment contracts when there is a *reasonable expectation* that it would be renewed. It has been held that a 'reasonable expectation' should be equated with a 'legitimate expectation.'⁶⁰³

Fixed term employees do not have an automatic right to recourse in terms of the LRA. The enquiry into whether or not a fixed term employee was dismissed is a legal question. The fixed term employee is required to lay a factual basis for the claim that he or she expected the employment relationship to continue and that such an expectation was reasonable.⁶⁰⁴ In other words, a reasonable expectation is a suspensive condition to the operation of s 186(1)(b) of the LRA. Unless there is a reasonable expectation, a fixed term employee cannot claim to have been dismissed under this provision.

At common law, the reason for dismissal of fixed term employees is only relevant if there was premature termination of the fixed term contract. Arguably, the same can be said about the statutory remedy.⁶⁰⁵ In the absence of a reasonable expectation that the employment would not have terminated, the fixed term employee would have no basis for a claim. In other words, the termination must have been 'premature' in the employee's mind and this belief must have been reasonable under the circumstances.

A fixed term employee could claim to have a legitimate expectation of being treated the same as a permanently appointed colleagues. Under certain circumstances it is also possible that fixed term employees could claim that they expected preferential treatment. In each case the court will determine on the facts, whether or not the expectation is sufficiently compelling.⁶⁰⁶

⁶⁰² *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 373.

⁶⁰³ *Council of Civil Service Unions & others v Minister of the Civil Service* [1984] 3 All ER 935, at 944 A - E.

⁶⁰⁴ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 35.

⁶⁰⁵ See Vettori Stella 'Fixed Term Employment Contracts: The Permanence of Temporary' *STELL LR* 2008 (2) 189 at 189 – 190 where it is indicated that an unfair dismissal is a material breach of contract. The author notes that it is in instances where a reasonable expectation of continuation exists or a tacit renewal of a fixed term contract has occurred that the statutory remedy can be used. See also Cohen Tamara 'When Common law and Labour Law Collide – Some Problems Arising out of the Termination of Fixed-term Contracts (2007) 19 *SA Merc LJ* 26 *et seq.*

⁶⁰⁶ *Administrator, Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 761G.

By its mere existence, the doctrine of legitimate expectation places a duty on employers to ensure that sufficient notice is given before termination of fixed term employees' contracts, particularly those appointed in terms of renewable fixed term contracts. In certain circumstances, the fairness would require holding a hearing prior to termination of a fixed term contract. Whether or not such an entitlement exists will need to be established based on the facts of each matter.⁶⁰⁷ If an employer is capable of providing sound reasons for why the expectation had not been given effect to, the court may decide not to enforce it.⁶⁰⁸

In England, the doctrine of legitimate expectation has been accepted as being capable of including expectations extending beyond enforceable legal rights.⁶⁰⁹ However, like in South Africa, this broadened scope of application has been rejected in Australia, Canada and Ireland.⁶¹⁰ Effectively, the doctrine is utilised in these countries, not only serves to protect employees' existing rights, but also provides protection of substantive or future rights. In a number of cases the principles of natural justice have been extended to assist persons having no existent right, but merely a legitimate expectation.⁶¹¹

South African courts still consider the doctrine of legitimate expectation as a tool that is mainly applied to ensure a fair procedure.⁶¹² In *Mokoena & others v Administrator, Transvaal*⁶¹³ it was decided that a 'legitimate expectation' refers to the rights sought to be taken away. Goldstone J held that if no right exists one cannot expect something which is not a right. In such circumstances the doctrine provides no remedy.⁶¹⁴

⁶⁰⁷ *Administrator, Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 761G. See also *Tetty & another v Minister of Home Affairs & another* 1999 (3) SA 715 (D) at 726C - E.

⁶⁰⁸ *Dhlamini v Minister of Education and Training & others* 1984 (3) SA 255 (N) at 257H.

⁶⁰⁹ Olivier M 'Legal Constraints on the Termination of Fixed Term Employment Contracts: An Enquiry into Recent Developments' at 1027 – 1028.

⁶¹⁰ *Meyer v Iscor Pension Fund* (2003) 24 ILJ 338 (SCA) at paras 25 – 27 and the foreign case law referred to therein.

⁶¹¹ *Everett v Minister of the Interior* 1981 (2) SA 453 (C) at 456 – 457. See also *Langeni & others v Minister of Health & Welfare & others* 1988 (4) SA 93 (W) at 96B - 98A, *Lunt v University of Cape Town & another* 1989 (2) SA 438 (C) at 447D - 448D and *Sisulu v State President & others* 1988 (4) SA 731 (T) at 737G - H.

⁶¹² In *Iscore Pension Fund v Murphy NO & another* (2002) 23 ILJ 481 (T) at 492 Van der Merwe J held that the doctrine of legitimate expectation does not operate to grant a complainant something to which he or she is not legally entitled. The court is of the opinion that only an individual's existing rights can be protected by the doctrine and no further substantive benefits can be afforded.

⁶¹³ *Mokoena & others v Administrator, Transvaal* 1988 (4) SA 912 (W) at 918D - E.

An employer's refusal to appoint a fixed term employee does not in the court's view affect an existing right. In *Van Biljon v Bloemfontein Transitional Local Council*⁶¹⁵ it was held that reasonable expectation of continuance of employment because of the operation of the doctrine of legitimate expectation only gives rise to an expectation to a fair procedure and not to a substantive right.⁶¹⁶ In *Thothe v National Development Bank*⁶¹⁷ the court commented that in many cases the facts would take a matter out of the scope of existing legal entitlements and fail to provide a remedy. This may result in a situation where lawful decisions that are unfair are absolved from judicial scrutiny. It is in such circumstances that the doctrine of legitimate expectation should be used to extend the law in order to assist persons negatively affected.

In some cases the traditional scope of the precept *audi alteram partem*⁶¹⁸ has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation.⁶¹⁹ An aggrieved fixed term employee may rely on the common law contractual protection after resignation because of an abuse of the procedure followed by the employer in the non-renewal of his or her fixed term contract. In *MISA/SAMWU obo members v Madikor Drie (Pty) Ltd*⁶²⁰ Revelas J held that employers are entitled to vary the terms of policies in the workplace. However, consultation with the employees is necessary if the variation of a policy would have a detrimental effect on them. The court's decision was based on the legitimate expectations of the employee that the original provisions of the policy would be applied.

The doctrine of legitimate expectation has been transposed into the South African legislation. The effect of the statutory incorporation is that the development of the protection in terms of the LRA is restricted to the interpretation provided to and consequences attached to 'legitimate expectation.' The reluctance to accept that the doctrine can be used to provide substantive benefits has a material impact on the

⁶¹⁴ In *Hadebe v Woolworths (Pty) Ltd* (1999) 20 ILJ 2459 (CCMA) at 2459J and in *Bayat and Durban Institute of Technology* (2006) 27 ILJ 188 (CCMA) at paras 32 – 33 the view that the doctrine only provides a remedy related to procedural fairness was also supported.

⁶¹⁵ *Van Biljon v Bloemfontein Transitional. Local Council* (1999) 20 ILJ 2481 (CCMA).

⁶¹⁶ *Van Biljon v Bloemfontein Transitional Local Council* at 2482.

⁶¹⁷ *Thothe v National Development Bank* (1993) 14 ILJ 1209 at 1209C - F.

⁶¹⁸ This principle is an established notion in South African Law. It is a precept of the right to natural justice. See *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC) at 377 - 378 and *Lefu & others v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 307 (IC) at 312 - 313.

⁶¹⁹ *Everett v Minister of the Interior* 1981 (2) SA 453 (C) at 456 - 457; *Langeni & others v Minister of Health & Welfare & others* 1988 (4) SA 93(W) at 96B - 98A; *Lunt v University of Cape Town & another* 1989 (2) SA 438 (C) at 447D - 448D; *Sisulu v State President & others* 1988 (4) SA 731 (T) at 737G - H.

remedies that are provided to fixed term employees against unfair labour practices and unfair dismissals. Since South African courts have not finally accepted that the doctrine of legitimate expectation could grant substantive relief, but only relate to procedural fairness,⁶²¹ the development of the concept of fairness at common law as well as in terms of the legislation has been limited.

2.6 The doctrine of estoppel

The doctrine of estoppel may be used by a fixed term employee where an employer denies the true state of affairs. This doctrine is aimed at preventing prejudice and injustice.⁶²² The doctrine of estoppel by representation entails that a person is precluded, or estopped, from denying the truth of a representation previously made by him or her to another person if the latter believing in the truth of the representation, acted thereon to his or her detriment.⁶²³ The person who by his or her action or omission created a false representation which the other person believed to be true would be estopped or precluded from denying the truth of the representation.⁶²⁴

Estoppel is a substantive law rule to provide a defence to a claim, or to counter a defence to a claim.⁶²⁵ It has to be pleaded and proved by the party who raises it. It is not a cause of action and cannot found a claim, but it can, in an indirect way, by defeating a defence to a claim, operate to secure the enforcement of a claim.⁶²⁶

⁶²⁰ *MISA/SAMWU obo members v Madikor Drie (Pty) Ltd* (2005) 26 ILJ 2374 (LC) at paras 20 – 22. See also *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC) at paras 20 – 22.

⁶²¹ In *Hadebe v Woolworths (Pty) Ltd* (1999) 20 ILJ 2459 (CCMA) at 2463 the commissioner observed that ‘the doctrine of legitimate expectation in its original formulation as a concept of administrative law, sits somewhat uncomfortably in the field of labour law, in that it gives rise to nothing more than a legitimate expectation of a fair procedure, as opposed to a substantive right.’

⁶²² Lord Denning in *Moorgate Mercantile Co Ltd v Twitchings* 1975 3 All ER 314 (CAC) at 326D – E described the doctrine of estoppel as ‘a principle of justice and equity’.

⁶²³ *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 291D – E. See also *NBS Bank Ltd v Cape Produce (Pty) Ltd* 2002 (1) SA 396 (SCA) at 411.

⁶²⁴ *Waterval Estate & Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 at 722 – 723. See also *Baumann v Thomas* 1920 AD 428 at 434 – 436 and *Oakland Nominees (Pty) Ltd v Gelia Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A – H. In addition, see *Stellenbosch Farmers’ Winery Ltd v Vlachos t/a Liquor Den* 2001 (3) All SA 577 (SCA) at 581 where Nienaber JA added that proof be furnished that ‘the reliance was not actuated by some external influence or factor other than the misrepresentation’.

⁶²⁵ In *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW) at 107D – E it is stated that estoppel in South African law is a ‘weapon of defence.’

⁶²⁶ For an in-depth discussion regarding the doctrine of estoppel and the requirements of proof to establish its applicability, see Rabie PJ (updated by Daniels H) ‘Estoppel’ in Christie RH *The Law of Contract in South Africa* 6th edn (2011) at paras 652 *et seq.*

In order to qualify as a representation for purposes of the application of estoppel, the employer or an authorised agent would have had to have communicated that which he claims to expect to the fixed term employee. This representation can emanate either through words, whether oral or in writing, or by acts or conduct, including inaction.⁶²⁷ An omission, for instance not renewing a fixed term contract when the employer created the expectation that the contract would be renewed, can only qualify as a representation if it can be proven that the employer or its duly authorised agent was under a legal duty to act.⁶²⁸ Therefore, it needs to be established by the fixed term employee that it would be unlawful not to hold the employer to its representation. It need not be proven that it is also unfair.

A fixed term employee who has a reasonable expectation of renewal of his or her contract can enforce that expectation based on estoppel.⁶²⁹ To successfully rely upon estoppel, he or she would have to prove that he or she had been misled by the employer and that he or she had acted reasonably in relying on the misrepresentation. If the fixed term employee knew or was deemed to know what the real facts were, he or she would be unable to rely upon estoppel. This coincides with the requirement of proving reasonableness of an expectation of renewal and is not an additional criterion. In other words, if the expectation that employment would continue past the contractual date determined between the parties, is unreasonable, the fixed term employee would have no claim.⁶³⁰

A fixed term employee would usually not be able to base his or her claim on estoppel, but would plead it in replication if the employer for instance denies that a person who created the expectation had been duly authorised or that the fixed term contract terminated automatically despite promises or undertakings that were made that the fixed term employee's employment would continue.⁶³¹

⁶²⁷ In terms of common law principles an 'act' can be both an action or doing something, or an omission (not doing something) where there is a legal duty to act. In this regard see *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 (4) SA 747 (A) at 761B – C, *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 335 and *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 291E – F.

⁶²⁸ Rabie 'Estoppel' in Christie RH *The Law of Contract in South Africa* (2011) at para 656.

⁶²⁹ Vettori Stella 'Fixed Term Employment Contracts: The Permanence of Temporary' at 193 – 196.

⁶³⁰ Rabie 'Estoppel' in Christie RH *The Law of Contract in South Africa* (2011) at para 661.

⁶³¹ *Union Government v National Bank of SA Ltd* 1921 AD 121 at 128, *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 49 – 50, *Bydowell v Chapman* 1953 (3) SA 514 (A) at 523 – 524A and *Arthur v Central News Agency Ltd* 1925 TPD 588 at 595. See also *Blackie Swart Argitekete v Van Heerden* 1986 (1) SA 249 (A) at 260I – J.

The onus to establish that estoppel applies rests on the party who pleads it.⁶³² A fixed term employee would be required to prove all the elements of estoppel. Usually, to succeed in a claim based on estoppel, detriment or prejudice as a result of the reliance must be proved.⁶³³ The prejudice in reliance on a false representation must be 'proximate' or 'real and direct' cause of such harm done to the fixed term employee.⁶³⁴ A fixed term employee should easily prove detriment as a direct result of the failure to renew the contract.

In *SA Broadcasting Corp v Coop & others*⁶³⁵ the Supreme Court of Appeal held that, although the senior officers or management employees had not been duly authorised, the employer had created a façade of regularity and approval of their actions.⁶³⁶ Furthermore, the court found that the essentials of estoppel, namely, that the person relying on estoppel was misled into believing that the person who acted had authority,⁶³⁷ that such belief was reasonable, and that the he or she had acted on this belief to his or her detriment or prejudice, had all been met.⁶³⁸

However, in the matter of *SA Revenue Service v CCMA & others*⁶³⁹ the fixed term employee failed to prove all the elements of estoppel. In this case, a fixed term employee was appointed for twelve months after which her contract was renewed for a further three month period. When the final contract terminated,⁶⁴⁰ the fixed term employee referred a dispute to the CCMA alleging that the employer had

⁶³² See for example *Strachan v Blackbeard & Son* 1910 AD 282 at 288 – 289; *Baumann v Thomas* 1920 AD 428 at 436 – 437, *Quinn & Co Ltd v Witwatersrand Military Institute* 1953 (1) SA 155 (T) at 159E – F; *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 427D – E and *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 363D – E.

⁶³³ *Peri-Urban Areas Health Board v Breet, NO & another* [1958] 2 All SA 224 (T) at 232 - 233.

⁶³⁴ Rabie 'Estoppel' at para 664. 'Proximate cause' and 'real and direct cause' are used interchangeably in various decisions. See for instance *Union Government v National Bank of SA Ltd* 1921 AD 121 130 ('the proximate cause') at 134 ('the proximate cause') and at 138 ('the direct cause'). See also *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 426A for a discussion of what qualifies as 'the real and direct cause.'

⁶³⁵ *SABC v Coop & others* (2006) 27 ILJ 502 (SCA).

⁶³⁶ *SABC v Coop & others* at paras 61 – 62.

⁶³⁷ It should be noted that such authority may be express or real, or ostensible. In the English case of *Hely-Hutchinson v Brayhead Ltd* [1968] QB 549 (CA) at 583A - G Lord Denning MR distinguishes between actual and ostensible authority. He describes 'ostensible' or 'apparent' authority as follows: 'Ostensible or apparent authority is the authority of an agent as it appears to others.'

⁶³⁸ *SA Broadcasting Corp v Coop & others* at para 79.

⁶³⁹ *SA Revenue Service v CCMA & others* (2009) 27 ILJ 1041 (LC) at paras 8, 16 & 18.

⁶⁴⁰ For an applicant to be successful in a claim of a legitimate expectation it would have to be proven on a balance of probabilities that he or she had a legitimate expectation that the last fixed term contract signed by him or her would be renewed. See for instance *Malinga & others and Pro-AI Engineering CC* (2003) 24 ILJ 2030 (BCA) at 2034.

misrepresented the fact that they would keep her on for another six months. Allegedly, she was told by a team leader that her contract would be extended. Francis J held that the person who made the representation to the fixed term employee that her contract would be renewed lacked authority to represent the employer.⁶⁴¹ Since he had only been acting as a team leader for a particular project, he could not have bound the employer by any misrepresentation that he could have made. It was held that it was also not evident from the facts that the employer had created a reasonable expectation that the fixed term contract would be renewed. Hence, it was held that no dismissal had occurred and that the CCMA lacked jurisdiction to entertain the dispute.⁶⁴²

Although the doctrine of estoppel is usually used as a defence, because fixed term employees often rely on legitimate expectation as a basis of a claim, this doctrine may assist them. In relying upon estoppel a fixed term employee can prevent an employer from basing the decision of the dismissal on the fact that the contract includes a specific reference to a termination date or event. In addition, this doctrine can be used to prevent an employer from denying the true state of affairs if someone with the required authority created an expectation of continuance of employment in the fixed term employee's mind.

2.6.1 *Turquand* rule

The *Turquand* rule is a rule that is similar to estoppel in some respects. This rule applies specifically to companies. The common law *Turquand* rule which was derived from the English decision in *Royal British Bank of Turquand*⁶⁴³ has also been used to assist a fixed term employee in at least one decision.⁶⁴⁴ In terms of the *Turquand* rule, if a person acting on behalf of a corporation is authorised to do so in terms of the

⁶⁴¹ Lack of actual authority is in my view a strange reason for denying the application of the doctrine of estoppel. Actual authority is not required for the doctrine to apply. The court did not in this judgment adequately consider the possibility of the existence of ostensible authority which is what is required. See *Mncube and Transnet* (2009) 30 ILJ 698 (CCMA) at para 19. See also *Hugo Group CC (in liquidation) & others* (2000) 21 ILJ 1884 (CCMA) at para 93 where the commissioner in his award did not consider the absence of actual authority as a reason excluding the application of estoppel. See also *Elundini Municipality v SALGBC & others* [2011] 12 BLLR 1193 (LC) at para 22 where the court asserted that it cannot be expected from the employee to ascertain whether or not the person making the representation was duly authorised by the employer.

⁶⁴² *SA Revenue Service v CCMA & others* (2009) 27 ILJ 1041 (LC) at paras 23 – 24.

⁶⁴³ *Royal British Bank of Turquand* (1856) 6 E & B 317, 119 ER 886.

company's constitutive document subject to the compliance with an internal management requirement in the company, a fixed term employee who is acting in good faith⁶⁴⁵ could assume that such requirement had duly been complied with.⁶⁴⁶ The common law rule contains two exceptions: If the fixed term employee knew that the internal requirements were in fact not complied with, or if the circumstances had been suspicious to the degree that he or she should have reasonably inquired in this regard, the rule would not apply.⁶⁴⁷ Consequently, the rule will only be applicable if the company's Memorandum of Incorporation confers authority of the person acting for the company to contract on the company's behalf. It must also be clear that, had the internal requirements been complied with, the person would have had actual authority.⁶⁴⁸

The Companies Act now also contains a provision that resembles the *Turquand* rule.⁶⁴⁹ In terms of this provision, a person dealing with a company in good faith may assume that the company, when taking a decision and in exercise of its powers, has complied with both the formal as well as the procedural requirements that it is required to comply with. The two exceptions to this rule are that it will not apply in instances where the person contracting with the company was aware of the fact that requirements had not been complied with, or if the circumstances were such that they should reasonably have known of the deficiency. The Companies Act determines that this statutory rule is to be interpreted concurrently with the common law principle and not in substitution thereof.⁶⁵⁰ A fixed term employee would be able to, if the conditions described above are complied with, rely upon the *Turquand* rule or in certain cases its statutory cousin to hold an employer accountable despite the fact that it had failed to follow its internal requirements.

⁶⁴⁴ *Southgate v Blue IQ Investment Holding* (2012) 33 ILJ 2681 (LC).

⁶⁴⁵ *Southgate v Blue IQ Investment Holding* at para 59.

⁶⁴⁶ *Southgate v Blue IQ Investment Holding* at para 60.

⁶⁴⁷ *Southgate v Blue IQ Investment Holding* at paras 60 - 62.

⁶⁴⁸ *Southgate v Blue IQ Investment Holding* at para 60.

⁶⁴⁹ Section 20(7) of the Companies Act.

⁶⁵⁰ Section 20(8) of the Companies Act.

2.7 Express contractual terms enjoy preference

Legal formalism⁶⁵¹ advocates that, in the interest of certainty, contracts should be interpreted and applied literally and without judicial discretion. The concept of 'fairness' is encompassed by the notion of Ubuntu which informs public policy in the contractual domain.⁶⁵² Although this principle has been used by the constitutional court in an attempt to infuse the common law contract, the principle of *pacta sunt servanda*, i.e. that contracting parties should be bound to agreements that they conclude, has often been preferred.⁶⁵³

Despite the fact that the common law has been developed to also include considerations of fairness, it does not mean that judges may decide cases on the basis of what they regard as being reasonable and fair as this would detract from legal certainty.⁶⁵⁴ The courts largely refrain from departing from the contractual provisions. Generally express terms in contracts enjoy precedence over implied terms as well as workplace custom and practice.⁶⁵⁵ The courts are also reluctant to influence the original agreement between the parties.

In *Malandoh v SA Broadcasting Corporation*⁶⁵⁶ Mlambo AJ declared that the court would, for as far as it is possible, give effect to the terms of a fixed term contract without incorporating other factors into the agreement reached between the parties. The courts will not impose a different contract to that which the parties had originally entered into.

⁶⁵¹ This means that legal rules are applied mechanically without judicial discretion so as to ensure certainty. This notion of classical contract law presumes that parties to a contract have equal bargaining power. Vettori Stella *The Employment Contract and the Changed World of Work* (2007) at 7 & 39.

⁶⁵² *Dula Investments (Pty) Ltd v Woolworths (Pty) Ltd* (1994/2013) [2013] ZAKZDHC 17 (8 May 2013) at para 51. See also *Barkhuizen v Napier* at para 51.

⁶⁵³ *Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at paras 70 & 72.

⁶⁵⁴ *Potgieter & another v Potgieter NO & others* 2012 (1) SA 637 at para 34.

⁶⁵⁵ *Lynch v Thorne* [1956] 1 WLR 303 at 306. See also *Martin v Murray* (1995) 16 ILJ 589 (C) at 600J where Marais J stated that "[t]he common law does not swing about like a weathervane in whatever direction any passing gust of wind may blow.... Traditionally courts have been reluctant to impede on contractual terms based on 'equity' or 'fairness.' Inequality of bargaining positions is not considered a sufficient reason to confer upon a court a common-law jurisdiction which is fundamentally alien to the basic notion that freedom of contract should exist, subject only to legislative regulation, legality, and the constraints of public policy." See further *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475B - F.

⁶⁵⁶ *Malandoh v SA Broadcasting Corporation* (1997) 18 ILJ 544 (LC) at 547.

The protection provided in terms of the common law contract is capable of adaptation to the prevailing socio-economic circumstances of all workers, including fixed term employees.⁶⁵⁷ Although the intention of the parties remains central, in determining whether or not the contract should be enforced, equity and social policy plays an important role. In *Denel (Pty) Ltd v Vorster*⁶⁵⁸ the Supreme Court of Appeal held that if terms of a contract are unfair, the courts could ameliorate the unfair effects. However, this mechanism will not strip a fair contract of its effectiveness.⁶⁵⁹

In *Delmas Milling Co Ltd v Du Plessis*⁶⁶⁰ the court held that, in case of difficulty in the interpretation of a contractual provision, it should be done by linguistic treatment. In such cases, limited additional evidence is permitted. However, if the problem cannot be solved with sufficient certainty by considering the language, the surrounding circumstances should be taken into account. Whether or not the surrounding circumstances should be considered is open to discretion based on the facts of each particular case. The golden rule of interpretation of a written provision is that the ordinary meaning should be provided to words, unless doing so would result in absurdity, repugnancy or inconsistency in the context of the rest of the instrument. In *Roffey v Catterall, Edwards & Goudre*⁶⁶¹ Didcott J held that sanctity of contract is founded on commercial as well as moral considerations. Not only is freedom to contract and loyalty essential in the market place, people should also be held to the promises that they make.⁶⁶²

In order to interpret a contractual provision the court must give effect to the contents by, in as far as it is possible, following the ordinary, grammatical meaning of the words that it contains. The only exception is, if it is apparent that the parties to the agreement intended them to mean something else. In the absence of ambiguity in the wording the courts have to give them the interpretation that they convey and not what may be conceived as more reasonable in the circumstances. The courts may nevertheless

⁶⁵⁷ See the Preface to Vettori Stella *The Employment Contract and the Changed World of Work* (Ashgate Publications 2007).

⁶⁵⁸ *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA) at 664 - 665.

⁶⁵⁹ See *Fredericks & others v MEC for Education and Training, Eastern Cape* (2002) 23 ILJ 81 (CC) at paras 12 & 25 *et seq.* In this case breach of the terms of a collective agreement that were incorporated into individual contracts of employment, was regarded as falling within the jurisdiction of the High Court.

⁶⁶⁰ *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454F - 455B.

⁶⁶¹ *Roffrey v Catterall Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 505F - H.

interpret provisions differently to their ordinary meanings, if giving effect to their ordinary meaning would lead to absurdity or inconsistency with the rest of the agreement, but only to such an extent as to remove such absurdity or inconsistency.⁶⁶³ The wording of the instrument itself in the context that is apparent therefrom as well as the purpose of the particular provision, should be considered together with the background to the drafting of the document.⁶⁶⁴

If a clause in a contract is unambiguous in relation to the context, intention and purpose of the agreement, extrinsic evidence is inadmissible. In case of an ambiguity in the wording, the conduct of the respective parties can also be scrutinised by the court.⁶⁶⁵ In case of ambiguity, a fixed term contract will usually be construed in a way which most favours the employee, since the contract is usually drafted by the employer.⁶⁶⁶

The principle that contractual provisions should trump may also be advantageous for fixed term employees. An example is the finding in *Buthelezi v Municipal Demarcation Board*.⁶⁶⁷ In this case the fixed term employee's contract was terminated before the agreed upon date for operational reasons. The court held that the premature termination of the fixed term contract was unlawful and unfair. The court held that despite the existence of fair operational reasons and the use of fair procedure a fixed term contract may not be unilaterally cancelled. The unlawful breach of the employment contract was viewed by the court as substantively unfair for this reason. The rights that employers enjoy to retrench fixed term employees fairly, were effectively subjugated to the interests of sanctity of contract. This advantage provided to fixed term employees elevates lawfulness over fairness. During the agreed upon term of a fixed term contract fixed term employees have an advantage over permanently appointed employees in the court's view.⁶⁶⁸

⁶⁶² This is also a biblical principle. See Matt 5:37.

⁶⁶³ *Scottish Union and National Insurance Company Limited v Native Recruiting Corporation Limited* 1934 AD 458 at 465. See also *S v Zuma and others* 1995 (2) SA 1 (CC) at paras 17 – 18 and *Dula Investments (Pty) Ltd v Woolworths (Pty) Ltd* (1994/2013) [2013] ZAKZDHC 17 (8 May 2013) at para 35 in which this principle was applied.

⁶⁶⁴ *Dula Investments (Pty) Ltd v Woolworths (Pty) Ltd* (1994/2013) [2013] ZAKZDHC 17 (8 May 2013) at para 36. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

⁶⁶⁵ *Masakhane Security Services (Pty) Limited v University of Fort Hare* [2013] JOL 30260 (ECB) at para 30.

⁶⁶⁶ See for example *Nkopane & others v Independent Electoral Commission* (2007) 28 ILJ 670 (LC) at paras 53 and 73 - 74 where the *contra proferentum* - rule of construction was applied to determine that a contract was a fixed term contract and not one of indefinite duration.

⁶⁶⁷ *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).

⁶⁶⁸ *Buthelezi v Municipal Demarcation Board* at paras 5, 7, 9, 14 & 16.

This decision seems to be incorrect in law. The right to sanctity of contract is not a constitutionally entrenched right. The right to fair labour practices, on the other hand is a fundamental right⁶⁶⁹ that should not be trumped by the common law contractual provisions. A constitutional right should also only be limited in terms of s 36 of the Constitution,⁶⁷⁰ which was not considered in this case. The court failed to consider the employer's right to fair labour practices by not recognising the right that an employer enjoys to terminate a fixed term employee's services for operational reasons. Permanently appointed employees are indirectly discriminated against because the court seemed to suggest that fixed term employees should enjoy preferential treatment during retrenchment processes.⁶⁷¹

In *Mmethi v DNM Investments CC t/a Bloemfontein Celtics Football Club*⁶⁷² a football player was appointed for five years in terms of a fixed term contract. The fixed term employee was dismissed by the employer, allegedly for operational reasons. The fixed term employee claimed damages since he alleged that it is not possible to lawfully terminate a fixed term contract prematurely without it being a material breach of contract. The arbitrator, in my opinion correctly, questioned and criticised the way in which the principle had been applied previously by the Labour Appeal Court in *Buthelezi v Municipal Demarcation Board*.⁶⁷³ It was decided that even if the court was correct in that case, the position would be different in relation to professional soccer, which was subject to the FIFA regulations and recognized termination for 'just cause'. This view is commendable and it accords with the general stance followed in the South African labour dispute resolution system. It also makes commercial sense that employers should be permitted to terminate employment contracts in circumstances that justify it.

Similar to unfair dismissal disputes under s 186(1)(b) of the LRA, to prove an unfair dismissal at common law requires consideration of all the surrounding circumstances. The factors that are considered in a common law enquiry would be the same as those considered in terms of statute.⁶⁷⁴ A fixed term employee cannot allege that his or her

⁶⁶⁹ Section 23 of the Constitution.

⁶⁷⁰ Section 36(2) of the Constitution.

⁶⁷¹ For a very insightful case discussion see Cohen Tamara 'Premature Termination of Fixed-Term Contracts: *Buthelezi v Municipal Demarcation Board*' (2004) 25 ILJ 2317 (LAC)' (2005) 26 *Industrial Law Journal* 1186.

⁶⁷² *Mmethi v DNM Investments CC t/a Bloemfontein Celtics Football Club* (unreported) Case No. JS1298/09.

⁶⁷³ *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).

⁶⁷⁴ Vettori Stella 'Fixed Term Employment Contracts: The Permanence of the Temporary' *Stell LR* 2008 Vol. 2 189 at 207.

subjective interpretation of the contractual terms reflect a common intention that the fixed term contract would be converted into an indefinite contract. In such instances, the parole evidence rule may prevent an employee from producing extrinsic evidence that contradicts the original terms of the written fixed term contract.⁶⁷⁵

In *Swissport (Pty) Ltd v Smith NO & others*⁶⁷⁶ the employee was appointed in terms of a six month fixed term contract. After termination of her contract, she declared a dispute alleging that despite the express terms of the contract, both the contracting parties understood the appointment to be open-ended. The court applied the parole evidence rule⁶⁷⁷ excluding evidence about the surrounding circumstances. It was held that in the absence of indications of misrepresentation, fraud, duress or undue influence, the court should not deviate from the wording of the written agreement.⁶⁷⁸ This formalistic approach is inappropriate in the light of the Constitution. The open-ended nature of the fundamental right to fair labour practices provides the judiciary with scope to give content to the right to labour practices that are fair to both employers and employees. If a written contract is vague or ambiguous⁶⁷⁹ evidence must be led to show what the intention of the parties were at conclusion of the contract.⁶⁸⁰ Vagueness and ambiguity are also not always required before the courts would consider the surrounding circumstances.⁶⁸¹

⁶⁷⁵ The parole evidence rule is a rule that was adopted from English law and is classified as part of the South African law of evidence. In terms of this rule, if a contract has been reduced to writing, the written document is considered to be the exclusive memorial of the agreement between the parties and extrinsic evidence is disallowed for this reason. See for instance *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 and *Johnston v Leal* 1980 (3) SA 927 (A).

⁶⁷⁶ *Swissport (Pty) Ltd v Smith NO & others* (2003) 24 ILJ 618 (LC) at 618H - J.

⁶⁷⁷ *Swissport (Pty) Ltd v Smith NO & others* at paras 12 – 15 & 18. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47 and *National Board (Pretoria) (Pty) Ltd & another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26. The parole evidence rule was held to entail the following: ‘when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.’

⁶⁷⁸ *Swissport (Pty) Ltd v Smith NO & others* at para 14.

⁶⁷⁹ Contractual provisions would be considered ambiguous if two or more reasonable constructions of the stipulations are possible. It would constitute conflicting provisions if two provisions cannot reasonably both be given effect to. In cases where stipulations in an agreement are ambiguous or conflict the courts may consider extrinsic evidence in order to ascertain what the contracting parties intended. See *Bitumat Limited and another v Paramount Motors (Private) Limited t/a Belleview Service Station & another* [2013] JOL 30229 (ZH).

⁶⁸⁰ *De Paauw & Living Gold (Pty) Ltd* (2006) 27 ILJ 1077 at 1077I - J.

2.8 The effect of legislative protection against unfair dismissal on contractual protection

In *Fedlife Assurance v Wolfaardt*⁶⁸² a five year fixed term contract was terminated prematurely allegedly as a result of redundancy. The fixed term employee approached the High Court for relief claiming that there was an implied right included in the fixed term contract that he would not to be unfairly dismissed which was inherent to employment contracts generally.⁶⁸³ The employer argued that the employee was on the wrong green as the High Court lacked jurisdiction and that matter should have been referred to the LC instead.⁶⁸⁴

In the subsequent appeal, the SCA noted that the effect of the enactment of the Constitution might be that a right not to be unfairly dismissed has become part of South Africa's common law.⁶⁸⁵ In addition, the court was of the view that the protection against unfair dismissal as contained in the LRA did not detract from other rights and remedies that an employee, whose contract of employment was terminated, has. Therefore, the LRA provides remedies to supplement the common law rights.⁶⁸⁶ The SCA held that s 186(1)(b) of the LRA is aimed at providing a remedy to an employee who has no remedy in contract when a contract expires by the effluxion of time.⁶⁸⁷ An employee can therefore, in principle, claim for damages based on a breach of contract in addition to a claim for unfair dismissal.⁶⁸⁸

It has been contended that the common law principle that a fixed term contract expires automatically on the arrival of the date on which the parties agreed that it should, has

⁶⁸¹ See for instance *KPMG Chartered Accountants v Securefin Ltd & another* 2009 (4) SA 399 (SCA) at para 38. Although this case did not deal with an employment contract, the dicta regarding interpretation and admission of extrinsic evidence would be generally applicable to all contracts.

⁶⁸² *Fedlife Assurance v Wolfaardt* [2002] 2 All SA 295 (A).

⁶⁸³ *Fedlife Assurance v Wolfaardt* at para 18.

⁶⁸⁴ Section 191 of the LRA.

⁶⁸⁵ *Fedlife Assurance v Wolfaardt* at para 14.

⁶⁸⁶ *Fedlife Assurance v Wolfaardt* at para 16. *Grogan Employment Rights* (2010) at 97. The notion of unfairness as recognised is far wider than that in common law principles of contract. Employers could for instance be found guilty of an unfair labour practice for failure to promote an employee while such an employee would be unable to prove a contractual right to be promoted. The English courts, like the South African courts consider the statutory protection against unfair dismissal as a supplement to the common law. See for instance *Paul Buckland v Bournemouth University Higher Education Corporation* [2010] WL 605762 at paras 17 & 19.

⁶⁸⁷ *Fedlife Ltd v Wolfaardt* [2002] 2 All SA 295 (A) at paras 13, 15 - 17 & 22.

⁶⁸⁸ However, see the qualification which has been set by the court in *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA). In this case a contrary view, i.e. that provisions in the LRA cannot be incorporated into a contract unless explicitly done so, was preferred. See also the discussion under 4.2.1.

been altered by the unfair dismissal protection in the LRA.⁶⁸⁹ Olivier suggests that because the unfair labour practice regime brought about a change to the common law it is no longer unconditionally accepted that a fixed term contract of employment terminates automatically. He argues that considerations of fairness were introduced so that a contract which prior to the inception of the unfair labour practice regime would have automatically terminated would not necessarily automatically terminate anymore.⁶⁹⁰ But, the unfair labour practice provision originated in the equity jurisprudence of the Industrial Court.⁶⁹¹ It is also not unconditionally accepted at common law that a fixed term contract of employment would automatically terminate at the effluxion of the contract.⁶⁹² If the contracting parties to the fixed term contract later agree that the relationship would no longer be terminated in accordance with the original agreement, they would at common law be bound by the terms of the novated agreement.⁶⁹³ I consequently agree with Vettori that the factors that are taken into account in determining whether or not a right of continuation of employment exists have not been amended by the introduction of s 186(1)(b) of the LRA.⁶⁹⁴

The contract of employment has changed to also include considerations of fairness.⁶⁹⁵ The common law has been developed to recognise that employees have a contractual right to fair treatment. Employees are so entitled to a contractual right to fair pre-dismissal procedures.⁶⁹⁶ In *National Entitled Workers' Union v CCMA*⁶⁹⁷ it was confirmed that the common law contractual principles related to fair labour practices are

⁶⁸⁹ *SACTWU & another v CADEMA Industries (Pty) Ltd (C 277/05)* at para 13.

⁶⁹⁰ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1005.

⁶⁹¹ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at para 119.

⁶⁹² Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1013 – 1014 & 1021. In *Braund v Baker, Baker & Co* (1905) EDC 54 the possibility of tacit renewal based on the employer's conduct and other surrounding circumstances were considered.

⁶⁹³ In *Nobubele v Kujawa NO & another* (2008) 29 ILJ 2986 (LC) at paras 35 – 36 & 38 – 40 the Labour Court per Cele AJ held that novation of a fixed term contract into a permanent contract could occur. The novation would be dependent upon an express or implied offer on new terms by the employer before the termination of the contract. In *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC) 1044 at para 6 the court states that in such an event, the contract would no longer qualify as a fixed term contract.

⁶⁹⁴ Vettori Stella 'Fixed Term Employment Contracts: The Permanence of the Temporary' *Stell LR* 2008 Vol. 2 189 at 190 *et seq.*

⁶⁹⁵ See Cohen Tamara 'Implying Fairness into the Employment Contract' (2009) at 2294 where the author states: 'No longer is the employment contract the unfettered domain of the employer, but thanks to the constitutional promise of fair labour practices has evolved to import considerations of fairness and equity.'

⁶⁹⁶ *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA) at paras 4 - 8; *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA) at para 6.

⁶⁹⁷ *National Entitled Workers' Union v CCMA* (2003) 24 ILJ 2335 (LC) at 2339 - 2340.

subject to the constitutional goals and values and the requirements of fairness of the labour legislation.

The constitutional guarantee of fair labour practices imports protection against unfair dismissal into the common law relationship. This development was necessitated by the enactment of the Constitution. But, this was not intended to 'abrogate an employee's common law entitlement to enforce contractual rights.'⁶⁹⁸ The statutory protection against unfair dismissal does not detract from the common law rights that a fixed term employee may enjoy. Nugent AJA in *Fedlife Assurance Ltd v Wolfaardt*⁶⁹⁹ pronounces that the Legislature clearly intended to introduce a remedy against unfair dismissal as a supplement to the common law rights that employees enjoy. It is possible that in certain circumstances an employee's employment may be lawfully terminated, but that such termination may nevertheless be unfair.

In *Key Delta v Mariner*⁷⁰⁰ the Court held that the fairness requirements of the LRA could be impliedly incorporated into the contract of employment, thereby giving the High Court jurisdiction to determine an unfair dismissal dispute. Express contractual provisions that conflict with these implied terms will have to be interpreted against the backdrop of the Constitution.⁷⁰¹

Nienaber JA in *NUMSA v Vetsak Co-operative Ltd*⁷⁰² held that the relationship between lawfulness and fairness is not clear. An unlawful dismissal would probably always be regarded as unfair.⁷⁰³ However, a lawful dismissal will not for that reason alone be fair. Whether or not a dismissal was fair would depend on the facts of the particular matter.⁷⁰⁴

⁶⁹⁸ In *Ndzamela v Eastern Cape Development Corporation* [2003] 6 BLLR 619 (Tk) the summary dismissal of an employee, with short notice payment was held to constitute an unlawful breach of the employment contract.

⁶⁹⁹ *Fedlife Assurance Ltd v Wolfaardt* at para 18.

⁷⁰⁰ *Key Delta v Mariner* [1998] 6 BLLR 647 (E) at 651 - 652.

⁷⁰¹ *Key Delta v Mariner* at 1652.

⁷⁰² *NUMSA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (AD) at 592F - H.

⁷⁰³ In *Mohlaka v Minister of Finance* [2009] 4 BLLR 348 (LC) at para 19 the Labour Court held that an unfair dismissal would also be unlawful because of the violation of the LRA's provisions and thus qualify as a breach of the employment contract.

⁷⁰⁴ See *Council for Scientific and Industrial Research v Fijen* (1996) ILJ 18 at 27A - B and *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA) at 318H - I. See also *Amazulu Football Club v Hellenic Football Club* (2002) ILJ 2357 (ARB) at 2364G - H and *Council of Mining Unions v Chamber of Mines SA* (1985) 6 ILJ 293 (IC) at 295C.

The principle that a lawful dismissal would not always be fair can be illustrated with reference to the position of directors in companies.⁷⁰⁵ The rights contained in labour law and company law may at times affect each other.⁷⁰⁶ The procedures contained in the Companies Act 71 of 2008 (Companies Act) for removal of directors require only lawfulness. In terms of the Companies Act, a director may be dismissed for any or no reason. It is impossible to exclude the possibility of dismissing a director by means of a contract.⁷⁰⁷ The only legal consequence of a removal contrary to any agreement or employment contract, would be that the employee would remain entitled to claim based on a breach of contract for the loss of office as a director or another office connected to his or her appointment as a director.⁷⁰⁸

If a director's employment in a company is intrinsically connected to his or her directorship, removal will constitute a dismissal. In other words, if termination of his or her directorship would mean that such a person is no longer an employee the director would have been dismissed. The LRA prevails over any other legislation, except for the Constitution in case of conflict between the LRA and such other legislation.⁷⁰⁹ The Companies Act also provides that the LRA will prevail in case of inconsistency.⁷¹⁰ Therefore, the prescriptions of the LRA need to be followed to ensure fairness of a director's dismissal.⁷¹¹ The discretion of the shareholders or board of directors to remove a director under the Companies Act is unfettered. However different rules apply for purposes of the LRA where the principle of fairness is the overriding factor.⁷¹²

⁷⁰⁵ Directors may be fixed term employees. Section 68(1) of the Companies Act 71 of 2008 provides that a director of a for profit company who is not the first director or appointed in terms of the company's Memorandum of Incorporation must be elected to serve either indefinitely *or for a term as set out in the Memorandum of Incorporation*. Section 15(6) of the Companies Act determines that the Memorandum of Incorporation creates a binding relationship between the company and various groups mentioned therein. It is suggested that a contractual relationship is created. See also *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* (2005) 5 SA 550 (SCA) at 553 where it is confirmed that the relationship between a director and a company is contractual.

⁷⁰⁶ *Chillibush Communications (Pty) Ltd v Johnston NO & others* (2010) 31 ILJ 1358 (LC) at para 42.

⁷⁰⁷ Section 71 of the Companies Act.

⁷⁰⁸ Section 71(9) of the Companies Act.

⁷⁰⁹ Section 210 of the LRA.

⁷¹⁰ Section 5(4)(b)(i) of the Companies Act.

⁷¹¹ *Chillibush Communications (Pty) Ltd v Johnston NO & others* (2010) 31 ILJ 1358 (LC) at para 42.

⁷¹² See *SA Organic Fertilizer Holdings Limited v CCMA & others* [2001] ZALC 213 at paras 10, 13, 18 & 25. See also *PG Group (Pty) Ltd v Mbambo NO & others* (2004) 25 ILJ 2366 (LC) at para 29, *South African Post Office Ltd v Khutso Mampeule* LAC Case no. JA29/09 (unreported) at para 18B; *SA Post Office Ltd v Mampeule* [2009] 8 BLLR 792 (LC) at paras 28 & 46 and *Chillibush v Johnston* at para 42. In *Creemark a Division of Triple P Chemical Ventures (Pty) Ltd v SACWU & others* (1994) 15 ILJ 289 (LAC) at 292I & 293C – D it was confirmed that in relation to renewal of fixed term contract this proposition also applies.

2.9 Access to contractual remedies

If an employer fails to comply with an express agreement, or implied term in a fixed term contract, such an employer may be held accountable based on the general principles of the law of contract. In the event of a material breach of contract, the innocent party may cancel the agreement.⁷¹³ It could also qualify as a material breach of contract if either of the parties to an employment relationship acts in a way which is contrary to the mutual trust and confidence that is an element of every employment contract. *Stewart Wrightson (Pty) Ltd v Thorpe*⁷¹⁴ serves as an example. In this case, the court held that the employer was guilty of a material breach of contract for degrading the employee's status. Accordingly, the employee was entitled to cancel the contract and claim damages for breach. Failure to renew a fixed term contract if renewal was expressly provided for in the fixed term contract, or not abiding with the agreement if the circumstances mandate implication of tacit terms of the contract, would constitute a material breach of contract.⁷¹⁵

However, to access the remedies provided for in terms of the law of contract is not easy. In *Van Rooyen v Rorich Wolmarans & Luderitz Ing*⁷¹⁶ it was held that a plaintiff who sues on the ground of breach of contract must prove the terms of the contract on which he or she relies. In addition, he or she bears the onus of proving that any term relied upon by the defendant to avoid liability was not agreed upon.⁷¹⁷ Therefore, the onus of proof rests on the fixed term employee who alleges that he or she has been dismissed by the employer.

Although all the surrounding circumstances of the matter can be considered to determine the nature of the working arrangement and the employee is therefore not dependent only on the terms of a written contract, it may remain difficult to prove a case, particularly if the employment contract contains an express provision which

⁷¹³ Grogan *Workplace Law* (2009) at 149. Contractual claims may be enforced by the civil courts.

⁷¹⁴ *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 951 – 952.

⁷¹⁵ A material breach is one that is a 'sufficiently serious breach of a sufficiently important term' by one contracting party. Christie RH *The Law of Contract in South Africa* 5th edn (2006 LexisNexis Butterworths) at 514.

⁷¹⁶ *Van Rooyen v Rorich Wolmarans & Luderitz Ing* [2009] 2 All SA 201 (SCA).

⁷¹⁷ *Cloud Hamandawana and Dispute Resolution Centre & others* Case no. C649/2012 (5 November 2013) at para 18.4 where Lagrange J for instance indicated that where an employee alleges that he or she is appointed permanently despite the fact that this was not confirmed in writing, he or she bears the onus of proof.

excludes the possibility of such a claim.⁷¹⁸ Evidence would probably have to be led after ex-colleagues are summoned to testify on the employee's behalf. Colleagues who continue working for the employer would be reluctant to testify against their current employer. In order to succeed in a claim for damages the plaintiff would have to prove that there was a material breach of contract or repudiation, that he or she had suffered damages, that there was a causal link between the breach and the damages and that the loss suffered was not too remote.⁷¹⁹

At common law an employment contract need not be reduced to writing.⁷²⁰ Particulars of employment should be provided to fixed term employees. An employer is only obliged to provide a fixed term employee with brief written particulars of their appointment.⁷²¹ However, employers rarely comply with this legislative requirement.⁷²²

In the UK the requirements regarding the provision of details of the engagement are much stricter than in South Africa.⁷²³ Written particulars have to include all material aspects of the employment relationship and will serve as proof of the material terms of the agreement.⁷²⁴ An employee can lodge a complaint with the Employment Tribunal if the employer fails to provide a complete, accurate statement. To dismiss an employee for reasons related to requesting written particulars would be automatically unfair.⁷²⁵ There is no corresponding obligation in South African legislation. This has a negative effect on all employees, including fixed term employees in accessing contractual remedies.

The unlawful termination of a contract of employment can give rise to an order for specific performance and/or an award of damages as compensation for the breach.⁷²⁶ Re-appointment or re-instatement⁷²⁷ combined with, or in addition to, a possible claim

⁷¹⁸ As mentioned, express terms enjoy preference over implied and tacit terms. See the discussion under 2.7 above.

⁷¹⁹ *Tsonanyane v University of South Africa* (2009) 30 ILJ 26696 (GNP) at para 19.

⁷²⁰ *Grogan Employment Rights* (2010) at 75.

⁷²¹ Section 29(1) of the BCEA.

⁷²² RIA of 2010 at 64.

⁷²³ Sections 3(1), 7A & 7B of the Employment Right Act of 1996.

⁷²⁴ Sections 1 & 2 of the Employment Rights Act of 1996. See also *Lange v Schünemann GmbH* (2001) IRLR 244.

⁷²⁵ Sections 3(1) & 11 of the Employment Right Act of 1996. See also *Mears v Safecar Security Ltd* [1982] 2 All ER 865.

⁷²⁶ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 35 – 36.

⁷²⁷ 'Re-instatement' means putting the employee back into the position that he or she had filled before the dismissal had occurred. See *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) at

for damages are the remedies available to fixed term employees who successfully prove the commission of a breach of contract by the employer.⁷²⁸ Logically, a claim for specific performance would provide the outcome closest to that which is intended. But, similar to statutory claims, the remedy of specific performance is rarely ordered.⁷²⁹

Even if an employee is able to prove that a breach of contract had occurred, he or she would not automatically be entitled to an award of damages. Although the applicant in *SA Music Rights Organisation Ltd v Mphatsoe*⁷³⁰ was the employer and not the employee, this case serves as an example. In this case, the employee stopped working prematurely in breach of the employment contract since he did not give a month's notice of termination. Although Van Niekerk J accepted that a breach had occurred, he was not convinced that the employer suffered any conceivable damages.⁷³¹

Contractual damages flowing from breach of contract are purely pecuniary. The aim of such damages are to place the person prejudiced by the breach in the position he or she would have been in if such a breach did not occur. The contractual right to fair dealing draws into question the assumption that an award of damages is intended only as protection of an aggrieved fixed term employee's right to be paid for the remainder of the time that he or she had not been allowed to work or denied notice payments.⁷³²

As compensation is intended to restore the applicant to the financial position that he or she would have been in if no breach had occurred, a fixed term employee would in

para 36. If the court orders specific performance, the status must be returned to what it was before the breach. Re-instatement or re-appointment will however not be ordered when there has been an irreparable deterioration in the employment relationship or the employee's performance cannot be effectively monitored. Grogan *Employment Rights* (2010) at 69 - 70. See also *Wyeth SA (Pty) Ltd v Manqele & others* at para 48 and *National Union of Textile Workers & others v Stag Packagings (Pty) Ltd & another* (1982) 3 ILJ 285 (T) at 291 where Van Dijkhorst J held that as a general rule a party to a contract which had been wrongfully rescinded by the other party could hold the other party to the contract if he so elected. See also *Santos Professional Football Club (Pty) Ltd v Ingesund & another* (2002) 23 ILJ 2001 (C) at 2011 - 2015 where Foxcroft J drew a distinction between specific performance as a remedy in English Law and South African law. It was indicated that in South Africa, this is the primary remedy. In *National Airlines (Pty) Ltd v Roediger & another* (2006) 27 ILJ 1469 (W) at paras 14 - 34 the applicability of specific performance in general and as a labour law remedy is discussed.

⁷²⁸ *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A).

⁷²⁹ *Schierhout v Minister of Justice* 1926 AD 99 at 153. The employment relationship is viewed as a close, personal relationship. The courts find it undesirable to intrude in this type of relationship. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 36.

⁷³⁰ *SA Music Rights Organisation Ltd v Mphatsoe* (2009) 30 ILJ 2482 (LC).

⁷³¹ *SA Music Rights Organisation Ltd v Mphatsoe* at 2488 – 2490. See also *Labournet Payment Solution (Pty) Ltd v Vosloo* (2009) 30 ILJ 2437 (LC) at 2442 – 2443 where this principle was confirmed.

⁷³² *SA Music Rights Organisation Ltd v Mphatsoe* at 2490F - G.

principle be entitled to an unlimited claim as long as he or she is able to prove that this was the actual loss suffered. This is not always easy to prove.

Even though remedies are available to fixed term employees for unlawful termination of their contracts of employment at common law, the existence of statutory restrictions may diminish the remedy he or she can claim. Since the BCEA determines that a contract of employment may be terminated by a party with a month's notice⁷³³ even if a fixed term contract was renewed many times, in the absence of proof of additional actual damages, the claim amount would be restricted to only one month's remuneration which the employee would have received had the employer terminated the contract lawfully by giving notice.⁷³⁴

The quantification of pecuniary damages is founded on principles of fairness and equity. Even if the court determines a higher amount in the interest of fairness, the amount of actual damages suffered would most likely be limited to the amount the fixed term employee would have received if the contract ran its natural course. At common law, medical costs and other expenses are also claimable. However, it would be difficult to claim non-patrimonial loss or damages resulting from infringements on dignity or psychological integrity. Determining the amount of damages suffered is a complex exercise dependent on many factors by the courts on a case-by-case basis.⁷³⁵ These damages would have to be claimed delictually.⁷³⁶

Litigants in contractual matters are required to mitigate their losses. Therefore, a fixed term employee whose contract was terminated unlawfully would be required to look for other work. The remuneration received by a fixed term employee for such employment would also be subtracted from the amount he or she is able to claim from the employer.⁷³⁷

⁷³³ Section 37(1) of the BCEA.

⁷³⁴ See for instance *Myers v Abramson* 1952 (3) SA 121 (C) at 127C - D.

⁷³⁵ Christie *The Law of Contract in South Africa* at 521.

⁷³⁶ Christie *The Law of Contract in South Africa* at 521. See also *Baartman & others and Bay United Football Club* (2011) 32 ILJ 1022 (ARB) at 1033 and *Victoria Falls & Transvaal Power Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.

⁷³⁷ See for instance *Everson v Moral Regeneration Movement* (2008) 29 ILJ 2941 (LC) at para 20.

2.10 Development to align the common law with the Constitution

The Constitutional Court, Supreme Court of Appeal and the High Courts are mandated to develop the common law according to the interests of justice.⁷³⁸ The courts are obliged to develop the common law in a way which is aligned with the values entrenched in the Constitution.⁷³⁹ It is the duty of the court to fill lacunae in protection offered by the LRA and to avoid the creation of further anomalies that contrasts the objects of the LRA⁷⁴⁰ and the values spirit of the Constitution.

The Constitution determines that a court must, when applying a provision of the Bill of Rights to a natural or juristic person, apply and, where necessary, develop the common law in as far as the legislation fails to give effect to a fundamental right.⁷⁴¹ The LRA was enacted with the express aim of giving effect to the objects of s 23. Had this not been the case, the courts would have been obliged to develop the common law to provide protection to fixed term employees. As far as the LRA falls short in providing protection of fair labour practices, the courts are still required to do so.⁷⁴² The common law may also be developed in a way which limits the fundamental rights, but only if such a limitation is effected in accordance with the general limitation clause.⁷⁴³

Cheadle opines that development of the common law is only necessary if effect is not given to a particular constitutional right in terms of the legislation. If, for instance, conduct does not fall within the definition of 'labour practice' in s 186(2) of the LRA, a

⁷³⁸ Section 173 of the Constitution.

⁷³⁹ Section 39(2) of the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. See also Grogan *Workplace Law* (2010) at 5 - 6.

⁷⁴⁰ Section 1 of the LRA. Sections 8(3) of the Constitution states that the court must apply or if necessary develop the common law to give effect to a right in the Bill of Rights, to the extent that legislation does not do so. Section 173 of the Constitution determines that the High Court has inherent powers to develop the common law in the interest of justice. See *Mohlaka v Minister of Finance & others* (2009) 30 ILJ 622 (LC) at 628E - G where Pillay J opines that the common law should be developed only to the extent that the legislation fails to give effect to a right contained in the Bill of Rights. Since the Legislature remains the main engine of reform, the court's power to develop the common law is very limited. See also *Kotze and Genis (Edms) Bpk v Potgieter* 1995 (3) SA 783 (C) at 786 where Conradie J recognised the need for the development of the common law with reference to the Bill of Rights, but warned against 'willy-nilly use of the naturally vague and idealistic provisions of the Constitution to set aside carefully constructed and detailed tenets and methods of private law... that would create chaos to dwarf the confusion that existed at the tower of Babel.'

⁷⁴¹ Section 38(2)(a) of the Constitution.

⁷⁴² *Key Delta v Mariner* [1998] 6 BLLR 647 (E) at 651G - J; *Naptosa v Minister of Education, Western Cape Government* 2001 [4] BCLR 388 (C) at 396B - C.

⁷⁴³ Section 38(2)(b) of the Constitution.

court would need to develop the common law so as to and only to the extent that it is required in order ensure that the fundamental right to fair labour practices as contained in s 23 of the Constitution is given effect to. Therefore, a fixed term employee who claims that the non-renewal of his or her contract is procedurally or substantively unfair should be able to approach the courts for relief despite statutory exclusion as a common law right.⁷⁴⁴ I agree with this view. There may be different or even overlapping causes of action on the same facts, particularly in the light of the Constitution. The courts have also acknowledged that the existence of a statutory right does not exclude the possibility of a common law claim.⁷⁴⁵

In *Johnson v Unisys*⁷⁴⁶ Lord Hoffman opined that in the process of developing the law, presiding officers must take account of the policies expressed in the legislation. It is necessary to strike a balance between the employer's interests and those of the employee. The individual affected employee's dignity is not the only concern in such circumstances. The general economic interest should be taken into consideration and other human rights should be observed. The adaptation and modernisation of the common law should not be inconsistent with the purpose of the legislation.⁷⁴⁷

The court has acknowledged the importance of considering socio-economic circumstances and policy considerations in developing the common law in instances where the law is not sufficiently flexible to adapt to change. It is necessary to shape the common law according to society's social, moral and economic needs. The Constitutional Court decided in *S v Thebus*⁷⁴⁸ that the Superior Courts may shape and develop the common law to the social, ethical and economic circumstances of society. The Constitution mandates this and requires that such development must be affected in line with the constitutional values. But, the courts consider the Legislature to be the main engine for legal reform. The common law is only developed in as far as it is in the Court's view necessary so as to keep the 'common law in step with the dynamic and evolving fabric of our society.'⁷⁴⁹

⁷⁴⁴ This is supported by Cheadle's argument that where no provision is made for fairness, since s 186(1)(b) does not provide in any respect for fairness. Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 35.

⁷⁴⁵ *Fedlife Assurance v Wolfaardt* [2002] 2 All SA 295 (A) at para 16.

⁷⁴⁶ *Johnson v Unisys* [2002] All ER 801.

⁷⁴⁷ *Johnson v Unisys* at para 37.

⁷⁴⁸ *S v Thebus* 2003 (6) SA 505 (CC) at para 31.

⁷⁴⁹ *Du Plessis v de Klerk & another* 1996 (3) SA 850 (CC) at para 61.

Concluding remarks

The common law Law of Contract provides a remedy to fixed term employees whose employment is terminated unlawfully.⁷⁵⁰ The common law has been developed to also include requirements of fairness and includes the right not to be dismissed unfairly.⁷⁵¹

The BCEA does not require the conclusion of written fixed term employment contracts.⁷⁵² Written particulars very often do not qualify as enforceable contracts. Extrinsic evidence is often excluded in an enquiry based on breach of contract. Fixed term employees are rarely afforded contractual benefits. Terms are not readily inferred into a contract.

In terms of the common law, fixed term contracts terminate automatically without legal consequence. It is well accepted that in the absence of a stipulation dealing with a notice period for termination,⁷⁵³ an employer can rely on the termination date agreed upon in a fixed term contract, without providing a fixed term employee with notice.⁷⁵⁴

Based on the principles of freedom to contract, parties may conclude contracts on any terms and be bound to them. This common law rule is fettered by the Constitution and public policy.⁷⁵⁵

The courts recognise the duty of mutual trust and confidence. A part of this duty is the duty to respect the legitimate expectations of fixed term employees.⁷⁵⁶ The courts have also recognised the fact that employment relationships, unlike commercial contracts, are evolving. Since obligations and expectations may change over time it becomes necessary to, in certain circumstances, imply terms in order to give effect to the intentions of the parties to an employment contract. So for instance, the continual rolling over of a fixed term contract could give rise to an implied term of continuance of a fixed

⁷⁵⁰ See the discussion under 2.8 above.

⁷⁵¹ See the discussion under 2.8 above.

⁷⁵² Section 29(1) of the BCEA.

⁷⁵³ It is possible to include a notice period in a fixed term contract. Grogan calls such an agreement a 'maximum duration contract'. Grogan *Employment Rights* (2010) 62 – 64. See also *Mafihla v Govan Mbeki Municipality* [2005] 4 BLLR 334 (LC) at para 37.

⁷⁵⁴ Gericke 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment' at 12.

⁷⁵⁵ See the discussion under 2.1.

⁷⁵⁶ See the discussion under 2.2 above.

term appointment.⁷⁵⁷ It is also accepted in the absence of an express agreement fixed term contracts may tacitly be renewed through conduct.⁷⁵⁸

The doctrine of legitimate expectation is part of the South African law. It extends the scope of protection that fixed term employees enjoy to instances beyond rights that are legally enforceable.⁷⁵⁹ However, South African courts are reluctant to accept that legitimate expectation goes further than merely the entitlement to a fair procedure.

In certain circumstances, the doctrine of estoppel can be used by a fixed term employee in order to prevent an employer from avoiding the legal consequences associated with a misrepresentation which it had made.⁷⁶⁰

The fact that protection is provided for in terms of legislation does not detract from the common law rights that fixed term employees enjoy. The statutory rights are intended to supplement the common law rights.

If the legislation fails to give effect to a constitutional right, the courts are required to develop the common law to the extent required to give effect to the fundamental right.

Often it would be very difficult for fixed term employees to prove an entitlement to a contractual right. That is why legislation in protection of the right to equal treatment,⁷⁶¹ to basic conditions of employment,⁷⁶² fair labour practices⁷⁶³ and against unfair dismissal⁷⁶⁴ was enacted to supplement the common law rights that fixed term employees enjoy.⁷⁶⁵

In the next chapter, the way in which the courts have applied the statutory protection available to fixed term employees, is considered.

⁷⁵⁷ See the discussion under 2.3 above.

⁷⁵⁸ This is discussed in 2.4 above.

⁷⁵⁹ See the discussion under 2.5.

⁷⁶⁰ See the discussion under 2.6.

⁷⁶¹ Section 9 of the Constitution.

⁷⁶² As set out in the BCEA.

⁷⁶³ As contained in s 186(2) of the LRA and s 23 of the Constitution.

⁷⁶⁴ As contained in s 186(1)(b) of the LRA.

⁷⁶⁵ *Fedlife Assurance Ltd v Wolfaardt* at para 13. See the discussion under 2.8 above.

The substance and practicality of the statutory rights of fixed term employees

3

Introduction

South Africa's labour dispute resolution system is very adversarial. Employees fight their employers for taking away a source of income required for their livelihood and their feeling of self-worth, while employers battle in order to maintain systems which make commercial sense to them. Being able to refer labour disputes to South African forums to resolve disputes does not necessarily mean that justice will prevail.

A range of specialised institutions have been established through legislation to resolve labour disputes in South Africa. Labour disputes are divided into those concerning disputes of interest and those dealing with the interpretation of existing rights.⁷⁶⁶ Only disputes of rights are adjudicated by specialist courts or tribunals. Labour disputes may also be referred to the ordinary courts.⁷⁶⁷

The LRA is the main South African labour dispute resolution mechanism in South Africa. One of the LRA's ambitious aims is to achieve social justice and labour peace.⁷⁶⁸ In promoting social justice, the expedient and effective resolution of labour disputes is of paramount importance.

There are many grey areas when it comes to the interpretation and practical implementation of the legislative protection available to fixed term employees. Case law is often variant and confusing and riddled by subjective considerations.

⁷⁶⁶ The distinction between disputes of interest and those of rights may be summarised as follows: 'Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or 'economic disputes') concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc.' Rycroft A and Jordaan B *A Guide to South African Labour Law* 2nd edn (Juta 1993) at 169.

⁷⁶⁷ Benjamin 'A Review of the Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives' (2005) at 3.

In this chapter, the dispute resolution procedures established in the LRA for fixed term employees to enforce their right to fair labour practices is investigated. How the weaknesses in legislation applicable to fixed term employees negatively affects the proper functioning of the system established to protect the rights of this vulnerable group of employees, is considered.

3.1 Practical difficulties in the enforcement of fair labour practices in terms of the LRA

Fixed term employees enjoy protection against unfair labour practices in the course of their employment. Generally, employees are less inclined to take the employers to task during the term of their appointment.⁷⁶⁹ Employees often choose not to institute action against their employers fearing dismissal or an inevitable deterioration in the working relationship. Fixed term employees expecting a permanent appointment in due course would be especially careful of stepping on their employers toes. This may lead to a situation where employers exploit employees for many years by renewing a fixed term contract on terms prejudicial to the employee.

A dispute about an unfair labour practice must be referred to a bargaining council or the CCMA within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.⁷⁷⁰

The protection against unfair labour practices logically only applies to the employment relationship. Except for former employees who may refer a dispute based on the employer's failure or refusal to re-instate or re-employ a former employee in terms of an agreement,⁷⁷¹ section 186(2) of the LRA only applies in the course of employment. But, it is possible for a fixed term employee to claim compensation for an unfair labour

⁷⁶⁸ Section 1 of the LRA.

⁷⁶⁹ In 2008 - 2009 about 82% of disputes referred to the CCMA were unfair dismissal cases. In 2010 - 2011 the figure dropped to about 81%. Unfair labour practices were only estimated at 7%. This indicates a tendency to rather take employers to task after termination of employment after the employment relationship has already been severed. Department of Labour 'CCMA Operations Report in the CCMA Annual Report 2010/2011' accessed at <http://www.ccma.org.za/Display.asp?L1=36&L2=21&L3=10> (2 September 2012) at 18.

⁷⁷⁰ Section 191 of the LRA.

⁷⁷¹ Section 186(2)(c) of the LRA.

practice after termination of his or her employment as long as the unfair practice occurred during the course of his or her employment.⁷⁷²

Unlike dismissal cases, the LRA does not contain a specific provision regarding the onus of proof in unfair labour practice disputes. Grogan opines that the Legislature's silence regarding this issue was intentional. In his view this suggests that employees are required to prove both the existence of a practice falling within the definition of s 186(2) of the LRA as well as the unfairness thereof.⁷⁷³ If a situation does not fall within the purview of the unfair labour practice provision, the CCMA will lack jurisdiction to entertain the dispute.⁷⁷⁴

Alleged unfair labour practice disputes must be referred to the CCMA or to a bargaining council having the necessary jurisdiction for arbitration.⁷⁷⁵ It could happen that during the proceedings, the employer justifies an unfair labour practice with reference to inherent requirements of the job or affirmative action, which would usually place the matter outside the CCMA's jurisdiction. It has been held that even if this is the case, the CCMA would have jurisdiction to hear a claim in terms of s 186(2) of the LRA.⁷⁷⁶

3.1.1 Unfair labour practice: promotion

An unfair labour practice dispute referred by a fixed term employee must fit within the provisions of s 186(2) of the LRA.⁷⁷⁷ Although fixed term employees rarely have a

⁷⁷² *Members of the Executive Council for Tourism & Environmental & Economic Affairs: Free State v Nondumo & others* (2005) 26 ILJ 1337 (LC) at 1340.

⁷⁷³ This premise accords with the principle that 'he who alleges must prove.' Grogan *Employment Rights* (2010) at 100.

⁷⁷⁴ *City of Cape Town v SAMWU obo Jacobs & others* [2009] 9 BLLR 882 (LAC) at para 28. See also *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at paras 17 - 18.

⁷⁷⁵ Section 191(5)(a)(iv) of the LRA. Section 191(5) of the LRA established a process of mandatory arbitration if the reason for the dismissal is related to the employee's conduct or capacity or if the employee grounds his or her dismissal case on the fact that the employer made continued employment intolerable or provided him or her with substantially less favourable conditions or circumstances at work after a transfer or the employee does not know the reason for dismissal or if the dispute concerns an unfair labour practice under s 186(2) of the LRA.

⁷⁷⁶ See *Department of Justice v CCMA & others* (2004) 25 ILJ 248 (LAC) at para 62 in this regard. The Labour Appeal Court rejected the argument that because affirmative action matters had to be referred to the Labour Court for adjudication and since the employer had raised this ground as justification for its actions that the CCMA lacked jurisdiction to entertain the dispute.

⁷⁷⁷ See for example *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others* (2006) 27 ILJ 2127 (LC) at para 30. Freund AJ held that a transfer does not fall within the definition. See also *City of Cape Town v SA Municipal Workers Union obo Jacobs & others* (2009) 30 ILJ

prospect of promotion,⁷⁷⁸ the concept of 'legitimate expectation' of promotion has been successfully applied in such disputes.⁷⁷⁹ If an employer created an expectation in an employee's mind that he or she would be promoted the employer's failure to promote such an employee may entitle him or her to challenge the employer's decision.⁷⁸⁰

If a fixed term employee claims to have had a reasonable expectation of permanent appointment, the question that springs to mind is whether not appointing him or her in the post that he or she expected to be appointed in, would qualify as an unfair promotion in terms of s 186(2) of the LRA. Promotion means elevation to a higher position. A lateral transfer or increase in job grade in the same post does not constitute a promotion.⁷⁸¹ A promotion may involve a salary increase, but this is not necessarily always the case. However, promotion always entails an elevation in status.⁷⁸²

A fixed term employee who alleges an unfair labour practice based on a reasonable expectation of permanent appointment or even temporary renewal is not elevated to a higher position if appointed in the post that he or she had expected to be appointed in. If he or she had been performing the same or similar work, possibly for years, it would be very difficult to prove that a subsequent appointment to the position would constitute an elevation in rank.

A fixed term employee who bases his or her claim on a reasonable expectation of an appointment would be hard-pressed to prove an entitlement to this remedy.⁷⁸³ In *Public Servants Association obo Botes & others v Department of Justice*⁷⁸⁴ where an employee was required to act in a higher position for an extended period claimed to have a legitimate expectation of promotion. The commissioner held that there is no precedent to accord substantive rights on basis of legitimate expectation. In *Dumisa and University of Durban Westville & others*⁷⁸⁵ Rycroft, sitting as commissioner, held that a

1983 (LAC) at paras 27 - 30 where on the facts Tlaletsi AJA held that applying for a post with your own employer does not always fall within the definition of unfair labour practice regarding promotion.

⁷⁷⁸ Vettori Stella 'Fixed term employment contracts: The permanence of the temporary' *STELL LR* 2008 (2) 189.

⁷⁷⁹ *Administrator, Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A); *IMATU v Stad Tygerberg* (1999) 20 ILJ 971 (CCMA). See also *February & another v Nestlé (Pty) Ltd* [2000] 5 LLD 182.

⁷⁸⁰ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 62.

⁷⁸¹ *Sukhdeo & Department of Social Welfare & Population Development (KZN)* [2006] 5 BALR 525 (PHWSBC).

⁷⁸² See for example *Mashogoane & another v The University of the North* [1998] 3 LLD 76 (LC) at 76 and *Jeje v Premier of the Province of KwaZulu – Natal & others* (2003) 24 ILJ 1392 (LC) at para 28.

⁷⁸³ See *IMATU obo Chapman v South Peninsula Municipality* [2000] 5 LLD 424 (CCMA) 424 - 425.

⁷⁸⁴ *Public Servants Association obo Botes & others v Department of Justice* (2000) 21 ILJ 690 (CCMA) at 695.

⁷⁸⁵ *Durusa and University of Durban Westville & others* [2001] 7 BALR 753 (CCMA).

legitimate expectation to promotion does not give rise to an expectation of appointment to the higher position, but only to be considered for appointment. To apply for a post for which you are qualified does not constitute a legitimate expectation of appointment. A fixed term employee has to comply with the minimum criteria as indicated in the advertisement and prove that he or she should reasonably have been considered for appointment under the circumstances.⁷⁸⁶

Under certain circumstances, unsuccessfully applying for a vacant position⁷⁸⁷ with your current employer may constitute an unfair labour practice related to promotion.⁷⁸⁸ It would for example be unfair to exclude an employee from the shortlist based upon an incorrect assumption that he or she lacks the necessary qualifications,⁷⁸⁹ or if the selection committee evidences clear bias.⁷⁹⁰ It has been held to be an unfair labour practice to overlook an employee who had been promised an appointment⁷⁹¹ or if a selection committee bases a decision not to promote on information heard via the grapevine without providing the employee with a right to be heard.⁷⁹² It would also constitute an unfair labour practice if an employer does not consider an applicant who had applied for a higher position properly and timeously.⁷⁹³

If an agreement has been reached between an employer and its employees to the effect that internal applicants would enjoy preference, it could constitute an unfair labour practice not to prefer internal candidates.⁷⁹⁴ If regard is had to irrelevant factors when making an appointment, a more meritorious fixed term employee could claim an unfair labour practice based on unfair promotion had occurred.⁷⁹⁵

⁷⁸⁶ Employers should be able to indicate objective criteria related to the post in question. Grogan *Employment Rights* (2010) at 113. See also *Public Servants Association obo Steenkamp v South African Police Service* [2003] 7 BALR 786 (SSSBC).

⁷⁸⁷ In order to rely upon either the remedy in terms of the unfair labour practice provision or the unfair dismissal protection there must be a vacancy. Grogan *Employment Rights* (2010) at 107. See also *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 1251A - D.

⁷⁸⁸ *Member of the Executive Council for Transport: KwaZulu-Natal & others v Jele* (2004) 25 ILJ 2179 (LAC) at para 8.

⁷⁸⁹ *Kotze v Agricultural Research Council of SA* (2007) 28 ILJ 261 (CCMA) at 262.

⁷⁹⁰ *Sehloho and the Department of Education* [2000] 12 BALR 1430 (CCMA).

⁷⁹¹ *Pretorius & Portnet* [2000] 10 BALR 1212 (IMSSA).

⁷⁹² *Mkhize and South African Police Services* [2004] 12 BALR 1468 (SSSBC).

⁷⁹³ *Public Service Association obo Dalton & Bradfield & Department of Public Works* [1998] 3 LLD 328 (CCMA) at 329 - 30.

⁷⁹⁴ *IMATU obo Xamleko and Makana Municipality* [2003] 1 BALR 4 (BC).

⁷⁹⁵ *Rafferty and Department of the Premier* [1998] 8 BALR 1017 (CCMA).

Workplace policies relating to renewal of fixed term contracts and permanent appointment of fixed term employees may give rise to expectations that fixed term contracts would be renewed. If there are specific policies in the workplace which an employer is required to adhere to, not promoting an employee has been held to be an unfair labour practice where the policies had not been followed.⁷⁹⁶

If employment policy in a workplace places restrictions on extension of fixed term contracts, contravention of the policy could amount to an unfair labour practice. This is exactly what happened in *Wood v Nestlé (SA) Pty Ltd*.⁷⁹⁷ In this case, the fixed term employee was appointed to complete a project. The employer's policy specified that extension of temporary contracts constitutes an unfair labour practice. The employer, contrary to its own policy renewed the fixed term contract several times. The Industrial Court found that a legitimate expectation was created by the employer that the fixed term employee would be considered for permanent employment. An amount of compensation was awarded to the employee on the basis of a permanent appointment.

The existence of a workplace policy and even collective agreements conducive to the creation of an expectation of permanent appointment cannot always be used to establish a claim in terms of s 186(1)(b) of the LRA. In *NUMSA obo Nkosi & another and Packspec*⁷⁹⁸ there was a collective agreement in the workplace which indicated that employees appointed for periods in excess of six months must be appointed indefinitely. Since the employer failed to appoint the fixed term employees to permanent positions after they had worked for longer than six months each, they claimed to have been unfairly dismissed.⁷⁹⁹ The employer argued that no dismissal had occurred since both the fixed term employees had been offered further fixed term appointments which they had refused to accept.⁸⁰⁰

The arbitrator noted that despite the fact that the matter was referred for arbitration in terms of s 186(1)(b) of the LRA, the fixed term employees were in actual fact asserting that an indefinite appointment had arisen because they continued working in the

⁷⁹⁶ *Wasserman v SAPS & others* (2006) 27 ILJ 2782 (BCA) at paras 41 & 53. See also *Baxter v National Commissioner: Correctional Services & another* (2006) 27 ILJ 1833 (LC) at paras 25 & 53 - 55.

⁷⁹⁷ *Wood v Nestlé (SA) Pty Ltd* (1996) 17 ILJ 184 (IC) at 190 - 192.

⁷⁹⁸ *NUMSA obo Nkosi & another and Packspec* (2011) 32 ILJ 1263 (BCA).

⁷⁹⁹ *NUMSA obo Nkosi & another and Packspec* at 1268.

⁸⁰⁰ *NUMSA obo Nkosi & another and Packspec* at 1265 - 1266.

absence of a signed contract stipulating a termination date.⁸⁰¹ The arbitrator rejected this contention. It was held that both the fixed term employees had been aware of the nature of their appointments. The continuous renewal of the fixed term contracts did not give rise to a claim to permanent employment. Since s 186(1)(b) of the LRA was considered a remedy incapable of application related to an expectation of permanent appointment, the arbitrator concluded that no evidence had been produced that a reasonable expectation of renewal had been created.⁸⁰²

Except for the *Wood v Nestlé (SA) Pty Ltd* - case discussed above, there is very little evidence in jurisprudence of cases in which fixed term employees successfully combined unfair dismissal claims under s 186(1)(b) of the LRA with claims for unfair labour practices.

The matter of *Van Blerk and Tshwane University of Technology*⁸⁰³ is another example of circumstances under which a fixed term employee could possibly claim based on unfair dismissal and for unfair labour practice simultaneously. In this case, a fixed term employee's contract as quality controller in the catering department had been renewed ten times. He had been promised a permanent appointment in the future. He took over as the acting head of department and remained in this position until his last fixed term contract expired and was not renewed. In 2004 three higher education institutions had merged to form the respondent.

The employer claimed that, during the merger process, staff could only be employed on a temporary basis. Upon completion of the restructuring process in 2010, the position of quality controller became a permanent position. The position of head of department in which the fixed term employee had been acting, was advertised in 2009 and 2010, but was not filled. The fixed term employee had applied for the position but was not even short-listed based on the fact that he lacked the required qualifications. The fixed term employee referred a dispute to the CCMA, claiming that he had a reasonable expectation of renewal of his contract in terms of s 186(1)(b) of the LRA.⁸⁰⁴ In addition, he claimed that the employer's refusal to appoint him as head of department permanently amounted to an unfair labour practice in terms of s 186(2)(a) of the LRA.

⁸⁰¹ *NUMSA obo Nkosi & another and Packspec* at 1269C – D.

⁸⁰² *NUMSA obo Nkosi & another and Packspec* at 1270F – 1271C.

⁸⁰³ *Van Blerk and Tshwane University of Technology* (2012) 33 ILJ 1284 (CCMA).

⁸⁰⁴ *Van Blerk and Tshwane University of Technology* at para 6.

The employer argued that the fixed term employee had been duly informed of this at the time of the last renewal of his contract. Therefore, it was alleged that he could have had no expectation of extension of his employment. The contract also included a clause in terms of which the fixed term employee acknowledged that he had no expectation of renewal. However, the contract had been renewed ten times and the functions that the fixed term employee performed were still required. In the commissioner's view the matter revealed a classic case of a flagrant, patent and unscrupulous abuse of the law on fixed term contracts.⁸⁰⁵ The applicant had proven the existence of a reasonable expectation of renewal of the contract. The commissioner held that, if a reasonable expectation of promotion is created and then subsequently frustrated by for instance not short-listing an eminently qualified employee for that position, it would constitute oppressive and unfair conduct on the employer's part.⁸⁰⁶ The employer was ordered to re-instate the fixed term employee on a permanent basis in the position of quality controller to consider him for the appointment as head of department.⁸⁰⁷

In the *Van Blerk*- case discussed above there were clearly two distinct causes of action: One relating to not giving effect to a reasonable expectation of continuance of his employment and the other related to the employer's unfair conduct in not considering him for the permanent appointment.

The LRA provides limited remedies for fixed term employees who are subjected to abusive conduct while employed, unless the unfair conduct falls under the LRA's 'unfair labour practice' definition. It may happen that the entitlement that the employee attempts to enforce is not a clear contractual right, but merely an expectation of fair and equal treatment. Also, the facts of a particular matter may not sit comfortably within the definition.

In *Public Servants Association & others v Department of Correctional Services*⁸⁰⁸ it was held that allowing employees to act in a higher position for considerable amounts of time may give rise to a reasonable expectation of promotion. If a fixed term employee's post is upgraded it could constitute unfair promotion if he or she is not appointed to a

⁸⁰⁵ *Van Blerk and Tshwane University of Technology* at paras 55 – 56 & 81.

⁸⁰⁶ *Van Blerk and Tshwane University of Technology* at paras 98 – 99.

⁸⁰⁷ *Van Blerk and Tshwane University of Technology* at 1031.

⁸⁰⁸ *Public Servants Association & others v Department of Correctional Services* (1998) 19 ILJ 1655 at 1673 - 1674.

post.⁸⁰⁹ In *De Nysschen v General Public Service Sector Bargaining Council & others*⁸¹⁰ the applicant applied for an upgraded post in which she had acted for several years. The selection committee recommended her appointment, but another candidate was appointed instead. The arbitrator held that the appointed candidate was the most suitable despite the fact that the applicant had acted in the post for several years.

On review, Revelas J noted that there was no compelling evidence that the other candidate was better suited for the post.⁸¹¹ The employer's discretion was, according to the court, fettered by the fact that it had to be exercised in a way that did not result in an unfair labour practice. The employer was ordered to appoint the employee to the post and to pay her salary as if she had been successful in her application.⁸¹²

However, it is acknowledged by the courts that to decide who should be promoted and appointed is within the scope of an employer's business prerogative.⁸¹³ In assessing whether or not an employer's conduct was reasonable, the courts consider whether they believe that the employer acted like a reasonable employer would have acted.⁸¹⁴

Consequently, the courts will not easily make a finding that interferes with this prerogative. In *Arries v CCMA & others*⁸¹⁵ the LC held that it would only interfere in an employer's decision if the employee could prove that the employer had exercised its discretion for insubstantial reasons, or based on a wrong principle and/or in a biased manner.⁸¹⁶ This assertion seems to be incorrect. The right to challenge promotions is derived from the definition of unfair labour practice. Section 186(2) of the LRA contains no intrinsic limitations requiring qualification.

If an employee is appointed in terms of a fixed term contract and the position he or she has filled temporarily is converted into a permanent position, the employee could harbour an expectation of appointment if there is no other reason relating to capacity or conduct to terminate his or her services. This is especially the case if no notice was given that his or her contract would not be renewed. Having acted in a position alone

⁸⁰⁹ *Truter and SA Police Service* (2005) 26 ILJ 821 (BCA) at 834 - 835.

⁸¹⁰ *De Nysschen v General Public Service Sector Bargaining Council & others* (2007) 28 ILJ 375 (LC).

⁸¹¹ *De Nysschen v General Public Service Sector Bargaining Council & others* at para 13.

⁸¹² *De Nysschen v General Public Service Sector Bargaining Council & others* at para 25.

⁸¹³ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 61.

⁸¹⁴ *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174 EAT.

⁸¹⁵ *Arries v CCMA & others* (2006) 27 ILJ 2324 (LC).

⁸¹⁶ *Arries v CCMA & others* at para 48.

does not create a legal entitlement to be appointed to it. It must be proven that the incumbent had a reasonable expectation to appointment.⁸¹⁷ Fixed term employees who are used to perform tasks in a vacant position, or to fill in for someone who is absent do not acquire a right to the post when it is subsequently filled.⁸¹⁸ Often fixed term employees who have been performing the advertised functions would be shortlisted and invited to an interview for the position. The discretion of an employer not to appoint such an employee in my view diminishes if such an expectation has been created. However, a reasonable expectation in terms of s 186(1)(b) of the LRA does not provide any remedy in circumstances where an employee has a legitimate expectation of promotion.⁸¹⁹

3.1.2 Unfair labour practice: Benefits

A second question is whether or not a fixed term employee expecting permanent appointment could then claim, not based on unfair promotion, but on the basis of unfair provision of benefits. If a fixed term employee had been performing the same or similar work as a permanent employee and expected a permanent appointment with all the benefits attached, would a failure to appoint him or her possibly qualify as an unfair labour practice related to benefits?

The provision of benefits is discretionary and not a legislated right provided for in labour legislation. Conditions of service are mainly regulated in terms of collective bargaining mechanisms and contracts.⁸²⁰ In terms of a recent benchmark case,⁸²¹ the general trend followed by the courts in denying the use of s 186(2)(a) of the LRA to enforce an entitlement to a benefit which he or she has not attained by virtue of a clear right has been changed. In this case the question was whether or not an early retirement scheme that was initiated by the employer qualified as a 'benefit' as contemplated in s 186(2) of the LRA.

⁸¹⁷ *SAMWU obo Govender & Durban Metro Council* [1999] 6 BALR 762 (IMSSA) at 767.

⁸¹⁸ *Grogan Employment Rights* (2010) at 96.

⁸¹⁹ *Public Servants Association obo Botes & others v Department of Justice* (2000) 21 ILJ 690 (CCMA) at 698A - B.

⁸²⁰ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 93.

⁸²¹ *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC).

The Court addressed the question as to whether an entitlement to this remedy is restricted to instances where an employee has an *ex contractu* or *ex lege* entitlement or whether it could include an advantage proffered to an employee in accordance with an employer's policy or practice subject to the employer's discretion.⁸²² In this case Musi AJA with Patel JA and Hlophe AJA concurring decided that policies and practices that are subject to the employer's discretion are also covered by the unfair labour practice provision and not only *ex lege* and contractual entitlements.⁸²³ In my view the finding in the *Apollo*-case is correct. It would make little sense only to allow an employee the remedy under these circumstances when there are existing grounds of review in terms of the law of contract. This lessens the scope for a premise that a clear contractual right is required considerably.

In *Department of Justice v CCMA & others*⁸²⁴ Goldstein AJA's view was that rights to benefits could emanate under the unfair labour practice provision in instances where neither the contract of employment nor the common law would provide a statutory remedy.⁸²⁵

From these cases it seems that should a fixed term employee be capable of proving the existence of a legitimate expectation of receiving benefits, obstruction of such an expectation may constitute an unfair labour practice.⁸²⁶ However, fixed term employees are not appointed permanently and often they do not receive the same benefits as permanently appointed employees. Benefits such as medical aid or medical scheme contributions, housing subsidies, pension fund benefits and leave benefits are generally made available exclusively to permanent employees.⁸²⁷ It may therefore be very difficult to prove that an expectation in the fixed term employee's mind is reasonable.

Another problem related to the unfair provision of benefits is of a more general nature affecting both fixed term employees and permanently appointed employees. The LRA

⁸²² *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* at paras 1 - 2.

⁸²³ *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* at para 50.

⁸²⁴ *Department of Justice v CCMA & others* (2004) 25 ILJ 248 (LAC).

⁸²⁵ *Department of Justice v CCMA & others* at para 14.

⁸²⁶ *Grogan Employment Rights* (2010) at 103. See also *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC) at paras 20 – 22 where Landman J opined that a legitimate expectation to a benefit could under certain circumstances be a sufficient basis for a claim for denied benefits.

⁸²⁷ See for instance *NAPTOSA & others v Minister of Education, Western Cape & others* (2001) 22 ILJ 889 (C) at 890 and *Yebe and University of KwaZulu-Natal (Durban)* (2007) 28 ILJ 490 (CCMA) at para 21.

does not define 'benefit'.⁸²⁸ There have been a number of cases that indicate what would not be considered a 'benefit' for purposes of the application of the LRA. Vehicle schemes for the allocation of vehicles to employees for use in the business that constitute a 'work tool',⁸²⁹ an acting allowance for standing in for someone even in a higher position that is not provided for in an employment contract or collective agreement,⁸³⁰ and an employer's contribution to a provident fund are not considered to be 'benefits'.⁸³¹

Remuneration⁸³² is not recognised as a 'benefit' for purposes of the LRA.⁸³³ Likewise, commission which is part of an employee's salary does not constitute a benefit.⁸³⁴ The unilateral reduction of wages is ordinary contractual claims. This may be why remuneration is excluded from what is interpreted as constituting a 'benefit'. However, distinguishing between remuneration and benefits is difficult to do and often results in an artificial distinction.⁸³⁵ The definition of 'remuneration' as contained in the LRA is sufficiently wide to also include wages, salaries and most benefits. It reads:

'Remuneration means any payment in money or in kind made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning.'⁸³⁶

⁸²⁸ In *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at para 20 the term 'benefit' for purposes of s 186(2) of the LRA is described as a term incapable of precise definition.

⁸²⁹ *Steenkamp & others and Eskom Distribution Western Cape* (2004) 25 ILJ 168 (CCMA) at 174.

⁸³⁰ *Northern Cape Provincial Administration v Commissioner Hambidge NO & others* (1999) 20 ILJ 1910 (LC) at para 19. See also *HOSPERSA & another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at para 90.

⁸³¹ *NUFAW obo Mgijima & others v Friedlein & Co (Pty) Ltd* (2004) 25 ILJ 165.

⁸³² 'Remuneration' is defined in s 213 of the LRA and s 1 of the BCEA as 'any payment in money or kind, or both in money or kind, made or owing to any person in return for that person working for another person, including the State.'

⁸³³ *Grogan Employment Rights* (2010) at 122. See also *Schoeman v Samsung Electronics (Pty) Ltd* (1997) 18 ILJ 1098 (LC) at 1102G – 1103A. For a summary opinions related to the meaning of 'benefit' see *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 ILJ 244 (CCMA) at 248 - 253. See also the recent decision in *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC).

⁸³⁴ *Schoeman v Samsung Electronics (Pty) Ltd* at 1102.

⁸³⁵ In *Protekon (Pty) Ltd v CCMA & others* (2005) 26 ILJ 1105 (LC) at paras 25 – 26 it was held that remuneration and 'benefits' are not necessarily mutually exclusive. In *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at paras 25 - 26 the differentiation between wages and benefits is also described as illaudable, artificial and unsustainable.

⁸³⁶ Section 213 of the LRA. 'Remuneration is defined in similar terms in item 12.1 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures, but here it expressly stated that in respect of leave and notice payments and severance pay, the Determination issued by the Minister i.t.o. s 35 of the BCEA should be consulted.

What qualifies as a 'benefit' in law is unclear. Making a definite distinction between benefits and remuneration is implausible.⁸³⁷ Employers often structure employee's wages into packages that are taxed. A cash component is often used to substitute benefits. This would be part of the employee's salary. Benefits that are included in a remuneration package contribute to employment costs. This makes distinguishing between benefits and remuneration particularly problematic.⁸³⁸

In 2003 a schedule on the calculation of remuneration was issued.⁸³⁹ It determines that for purposes of what should be considered as part of remuneration and what does not qualify as remuneration. This schedule indicates that housing subsidies, car allowances, the employer's contribution to medical aid and death benefit schemes and other benefits, cash payments and payments in kind that are not specifically excluded form part of an employee's remuneration.

The schedule excludes payments made to a worker to enable him or her to work, such as advances for the attainment of equipment, tools or transport, relocation, entertainment and schooling allowances, tips and gifts, share incentive schemes and any discretionary payments that are not related to an employee's hours of work or performance.⁸⁴⁰

This schedule is intended to serve as a guideline when calculating remuneration. Although it does not expressly indicate otherwise, it also does not provide that this list is exhaustive. Therefore, it fails to provide a clear indication of what would constitute a benefit.⁸⁴¹

⁸³⁷ It is in my view sounder to refer to the salary or wage which an employee receives as direct remuneration and additional benefits such as medical aid contributions, leave and pension as indirect remuneration. See Erasmus BJ, Strydom JW and Rudansky-Kloppers eds *Introduction to Business Management* 9th edn (Oxford University Press Southern Africa (Pty) Ltd 2013) at 323 where reference is made to direct and indirect compensation. Since 'compensation' refers also to one of the remedies provided for in s 194 of the LRA, 'remuneration' is preferred to avoid potential confusion.

⁸³⁸ Le Roux PAK 'Preserving the Status Quo in Economic Disputes' *Contemporary Labour Law* Vol. 6 No. 11 June 1997 93 at 97. See also Grogan *Employment Rights* (2010) at 124.

⁸³⁹ Republic of South Africa 'Schedule on the Calculation of Employee's Remuneration in terms of s 35(5) of the BCEA.' GG 24889 No. 691 (Published 23 May 2003).

⁸⁴⁰ Republic of South Africa 'Schedule on the Calculation of Employee's Remuneration in terms of s 35(5) of the BCEA.'

⁸⁴¹ Grogan *Employment Rights* (2010) at 126.

Section 186(1)(b) of the LRA and the remedies for unfair dismissal⁸⁴² do not include a monetary award for denied benefits during the course of a fixed term appointment. Compensation awards are often not made retrospective to the date of the dismissal.⁸⁴³

From the discussion above it is evident that the courts are not certain what is included under the definition of 'benefit' for purposes of the unfair labour practice provision. Employers are not obliged to provide benefits to employees whether they are indefinitely or temporarily appointed. As they are not required by legislation to provide benefits, they rarely do. In 2012 only about 33 percent of all employees received medical aid benefits from their employers.⁸⁴⁴ Fixed term employees are at a disadvantage in proving a right to benefits, because they often need to rely upon a reasonable expectation which the courts generally consider not to provide a right to substantive benefits.

3.1.3 Unfair labour practice: Demotion

If a fixed term employee is appointed to do a particular job and the employer unilaterally lowers him or her in rank, it may qualify as an unfair demotion. Fixed term employees are protected against unfair demotion at common law⁸⁴⁵ and in terms of the unfair labour practice stipulation.⁸⁴⁶ Demotion must be preceded by consultation and counselling. The failure to do so has been held to constitute an unfair labour practice.⁸⁴⁷ However, if an employee unreasonably refuses to accept a demotion in circumstances where such a demotion would have been reasonable, a demotion would be fair.⁸⁴⁸

⁸⁴² Sections 193 and 194 of the LRA. See the discussion under 3.5 in Ch 3.

⁸⁴³ In terms of s 193(1)(a) of the LRA re-instatement need not be made retrospective to the date of dismissal. See *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 at para 37.

⁸⁴⁴ Statistics South Africa 'Quarterly Labour Force Survey, Quarter 2, 2012' at xii accessed at <http://statssa.gov.za/> (12 March 2013).

⁸⁴⁵ See *Piki v Development Action Group Inc* (2002) 23 ILJ 609 (CCMA) at 615 and *Egerton v Mangosuthu Technikon* [2002] 10 BALR 1047 (CCMA). See also *Van Wyk v Albany Bakeries Ltd & others* [2003] 12 BLLR 1274 (LC).

⁸⁴⁶ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 66. See also *Van Wyk v Albany Bakeries Ltd & others* [2003] 12 BLLR 1274 (LC).

⁸⁴⁷ See *Van Niekerk v Medicross Health Care Group (Pty) Ltd* [1998] 8 BALR 1038 (CCMA). See also *Van der Riet v Leisureniet t/a Health & Racquet Clubs* [1998] 5 BLLR 471 (LAC) and *Salstaff obo Vrey v Datavia* [1999] 6 BALR 757 (IMSSA).

⁸⁴⁸ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 65.

In *Department of Justice v Wepener*⁸⁴⁹ it was held that an administrative clerk who had consistently acted as a relief magistrate had been demoted after he was relieved of his judicial function. But, this principle was not applied in the same way in *Minister of Justice & another v Bosch NO & others*.⁸⁵⁰ In this case a senior administrative clerk was appointed on a month to month basis to act as an assistant magistrate. After acting as such for five years, he was returned to his previous post as administrative clerk. The fixed term employee referred a dispute alleging that he had been unfairly demoted. The court held that the employer's actions in relinquishing his functions as judiciary and returning him to his old post amounted to the deprivation of the renewal of the fixed term contract, but did not constitute a demotion.

The deduction that can be made is that generally fixed term employees who are temporarily placed in higher positions would not be considered demoted when returned to their original positions. This gives rise to a phenomenon which is relatively strange in the South African labour law context. A fixed term employee would have to refer an unfair dismissal dispute in terms of s 186(1)(b) of the LRA despite the fact that he or she continues working for the employer.⁸⁵¹

3.2 The weaknesses of s 186(1)(b) of the LRA

In order for the unfair dismissal provision in the LRA to apply to a fixed term employee, he or she is required to prove the existence of a valid fixed term contract. This contract must have terminated, or the final decision must have been taken that the contract would not be renewed. The fixed term employee must have also harboured an objectively reasonable expectation that his or her fixed term contract would be renewed. The expectation must have been that the continued employment would be on the same or at least similar terms as the previous engagement and the employer should have

⁸⁴⁹ *Department of Justice v Wepener* (2001) 22 ILJ 2082 (BCA) at paras 38 & 52.

⁸⁵⁰ *Minister of Justice & another v Bosch NO & others* (2006) 27 ILJ 166 (LC) at paras 21 - 25.

⁸⁵¹ A fixed term employee would also be able to refer a dispute based on s 186(1)(b) of the LRA while he or she is still employed by the employer if for instance he or she is indefinitely employed and then also offered a fixed term contract. Such fixed term employment would then supplement the office already filled. Since the employment relationship will continue after the period of the fixed term appointment, the fixed term employee could under certain circumstances claim a reasonable expectation of continuation of employment on the same or similar terms. *Ackerman & another and United Cricket Board of SA* (2004) 25 ILJ 353 (CCMA) at paras 27 & 41.

failed to give effect to the fixed term employee's expectations. Only then can a fixed term employee claim to have been dismissed for purposes of the LRA's application. And even after all this has been proven it does not necessarily mean that the dismissal was necessarily unfair.⁸⁵² These aspects are elaborated on below with reference to case law in point.

3.2.1 The onus of proof

In the absence of a dismissal, the CCMA would not have jurisdiction in terms of the LRA to hear an unfair dismissal dispute referred to it in terms of s 186(1)(b) of the LRA.⁸⁵³ In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*⁸⁵⁴ it was held that the question concerning reasonable expectation of renewal of a fixed term contract in terms of the LRA is essentially a jurisdictional issue. In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*⁸⁵⁵ it was decided that determining whether or not a dismissal had occurred in terms of s 186(1)(b) of the LRA is required to establish whether the CCMA has jurisdiction to entertain the dispute at all.

If an employee is appointed until the occurrence of a specific event or the completion of a particular job, the employer bears the onus of proving that the event occurred or the task was completed.⁸⁵⁶ However, the LC seems to be reluctant to decide on whether or not a project was actually completed. In *National Union of Metalworkers of SA & others v SA Five Engineering (Pty) Ltd*⁸⁵⁷ for instance, the court was not prepared to second-guess the employer's business decisions. In this case, the contracts were supposed to terminate upon completion of the work. The court held that they had been terminated fairly since it did not wish to interfere in the employer's decision that the project had

⁸⁵² See generally Grogan John Adv 'Dashed expectations Limiting the scope of section 186(1)(b)'. Vol. 28 No. 2 *Employment Law Journal*.

⁸⁵³ Section 191 of the LRA. Before the CCMA would have jurisdiction to entertain a dismissal dispute in terms of s 186(1)(b) of the LRA, it would need to be established whether a dismissal has occurred. See *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 ILJ 2337 at para 29 in this regard. Even though this case dealt with a constructive dismissal and not one in terms of s 186(1)(b) it is relevant in as far as this jurisdictional aspect is concerned.

⁸⁵⁴ *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* [2011] ZALCCT 21 at para 13.

⁸⁵⁵ *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC) at paras 39 – 41.

⁸⁵⁶ Grogan *Employment Rights* (2010) at 62.

⁸⁵⁷ See in general *National Union of Metalworkers of SA & others v SA Five Engineering (Pty) Ltd* (2007) 28 ILJ 1290 (LC).

come to an end. This opens the door to termination of certain fixed term contracts without notice for arbitrary reasons.

The general rule is that the fixed term employee who claims to have been dismissed bears the onus to prove that a reasonable expectation of renewal existed.⁸⁵⁸ The burden of proof in cases in terms of s 186(1)(b) of the LRA weighs heavily on the fixed term employee. In order to establish the existence of a dismissal he or she is required to prove that an expectation of renewal existed and that such an expectation was reasonable.⁸⁵⁹ The requirement of proof of a reasonable expectation before a fixed term employee would be eligible to claim based on unfair dismissal is quite unique. Although, in some countries fixed term employees are completely excluded from the unfair dismissal protection,⁸⁶⁰ in other countries immediate access to unfair dismissal remedies are provided. In England, the legislation determines that not renewing a fixed term contract upon termination of the term or the occurrence of the agreed upon event, constitutes a dismissal. The employer is required to prove that the decision not to renew the contract was fair and reasonable and that reasonable consultation preceded the decision not to renew the fixed term contract.⁸⁶¹

It will also constitute a dismissal if the fixed term contract is terminated by notice prior to the time established for the termination of the contract or if the fixed term employee resigns due to a material breach of the contract by the employer. If, upon termination, a fixed term employee has worked for the employer for one year or longer, he or she is entitled to refer an unfair dismissal to an employment tribunal. An automatically unfair dismissal is not subject to any qualification period.⁸⁶² The reason for the adoption of this mechanism is to prevent the practice by employers to employ large sections of their

⁸⁵⁸ Section 192 of the LRA. Grogan John *Dismissal, Discrimination & Unfair Labour Practices* (Juta 2005) at 46 - 51. See also *University of the Western Cape & others v MEC of Executive Committee for Health & Social Services & others* (1998) 19 ILJ 1083 (C) at 1091 – 1092 and *Alvillar v National Union of Mineworkers* (1999) 20 ILJ 419 (CCMA). See also *Ferrant v Key Delta* (1993) 14 ILJ 464 (IC). *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) at para 21. See also *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 416.

⁸⁵⁹ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at para 17.

⁸⁶⁰ See the discussion in Ch 6 under 6.4.2.

⁸⁶¹ Section 95(1)(b) of the Employment Rights Act of 1996. See also Cohen Tamara 'When Common Law and Labour Law Collide – Some Problems Arising out of the Termination of Fixed-term Contracts' at 41 – 42.

⁸⁶² See for instance *Thames Television Ltd v Wallis* [1979] IRLR 136 EAT.

workforce on a fixed term basis in order to avoid obligations in terms of labour legislation.⁸⁶³

In England, upon the expiry of the fixed term contract a fixed term employee is for instance automatically entitled to the unfair dismissal protection in terms of the Employment Rights Act of 1996. The employer, on referral of a dispute for non-renewal of a fixed term contract, is required to prove that there was a fair reason for the decision not to renew the contract and the procedure followed to terminate the contract was fair.⁸⁶⁴

In order to establish whether or not an expectation is a reasonable expectation as envisaged in s 186(1)(b) of the LRA, the court has to conduct a two-stage enquiry. In *University of Cape Town v Auf der Heyde*⁸⁶⁵ the Labour Appeal Court stated that when deciding whether or not a fixed term employee had a reasonable expectation, the initial enquiry relates to whether he or she believed that his or her contract would be renewed or converted into an indefinite one. This is a question of fact. The next question would be whether or not such an expectation was reasonable under the particular circumstances. The second stage entails an objective test.⁸⁶⁶

In assessing whether a subjective expectation is reasonable, factors such as a person's intelligence, experience or qualifications may play a role. In *Avgold-Target Division v CCMA & others*⁸⁶⁷ Basson J, for instance, was reluctant to accept that the employee considered himself as being permanently appointed because he was a qualified attorney. In the commissioner's view he should have, for this reason, understood the temporary nature of a fixed term contract.⁸⁶⁸

The principles of reasonableness and fairness in relation to the surrounding circumstances are important factors to consider in determining the fate of an aggrieved

⁸⁶³ Lewis & Sargeant with Schwab *Employment Law: The Essentials* 11th edn (HR-Inform 2010) at 441.

⁸⁶⁴ Section 95(1)(d) of the Employment Rights Act of 1996.

⁸⁶⁵ *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) at para 21.

⁸⁶⁶ *Bronn v University of Cape Town* (1999) 20 ILJ 951 (CCMA) at 957 - 958.

⁸⁶⁷ *Avgold-Target Division v CCMA & others* (2010) 31 ILJ 924 (LC).

⁸⁶⁸ *Avgold-Target Division v CCMA & others* at para 27.

fixed term employee.⁸⁶⁹ Whether or not he or she can establish a claim of renewal is dependent there upon.⁸⁷⁰

After this initial phase, the evidentiary burden shifts from the employee to the employer. The employer may then either raise a defence from the wording of s 186(1)(b) of the LRA to indicate that the provision does not cover the particular claimant, or provide some other justification which may render the termination of the employment relationship fair.

Where a fixed term contract comes to an end through operation of law and not due to other reasons, the obligations of the employer to have a fair reason for the termination or to follow a fair procedure do not arise.⁸⁷¹ If there are other reasons for the termination of a fixed term employee's employment, the dismissal must be for a legitimate reason and be procedurally fair.⁸⁷²

There is no legislative provision pertaining to the provision of reasons for dismissal. However, the common law implies an obligation to provide a reason prior to termination of any employee's services in the premise of reasonable expectation. In *SACTWU v Mediterranean Woollen Mills*⁸⁷³ the fixed term employees were appointed for three months. The employer indicated that their service during this period would determine whether or not they would be re-employed. At the end of the three month period the fixed term employees who had performed well were offered re-employment. The contracts of the other fixed term employees, whose work had been unsatisfactory, were not renewed. The Supreme Court of Appeal in confirming the decisions of both the Industrial Court and the Labour Appeal Court held that the employees whose contracts were not renewed had not been informed of the reasons for rejecting them, nor afforded the opportunity to be heard. Although the reason for termination was not that their contracts had simply lapsed, they were never informed of the actual reason. This was held to have been unfair.⁸⁷⁴

⁸⁶⁹ *Dierks v University of South Africa* at 1246F – H. See also Olivier 'Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments' at 1030.

⁸⁷⁰ *Ferodo (Pty) Ltd v De Ruite* (1993) 14 ILJ 974 (LAC) at 981C - G.

⁸⁷¹ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* (LAC) at para 25.

⁸⁷² *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* (LAC) at para 26.

⁸⁷³ *SACTWU v Mediterranean Woollen Mills* (LC) (1995) 16 ILJ 366 (LC).

⁸⁷⁴ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* (LAC) at para 35. See also *Creemark a Division of Triple P-Chemical Ventures (Pty) Ltd v SA Chemical Workers Union & others* (1994) 15 ILJ 289 (LAC) at 293D - E.

In *Dierks v University of South Africa*⁸⁷⁵ the employer agreed that if the LC should find that a reasonable expectation had been created, the fixed term employee's dismissal would have been unfair since it had relied solely on the expiry of the fixed term contract for termination. Consequently, no dismissal procedures for purposes of the LRA had been followed. Likewise, there was no other reason for the termination of the employment as envisaged in s 188 of the LRA.⁸⁷⁶

An employer cannot rely on the fact that the term of the fixed term contract has lapsed. But, it would seem as if the other reasons would usually already be taken into account in the assessment of whether or not a fixed term employee could have a reasonable expectation of continuance of his or her employment.⁸⁷⁷ In *Van Biljon v Bloemfontein Transitional Local Council*⁸⁷⁸ the commissioner observed that the employer needs to prove the existence of *another reason* for the termination of the contract and the fairness of relying on that reason.

To be fair, the dismissal must be substantiated by a fair reason relating to the employee's conduct, capacity or the employer's operational requirements and a fair procedure must have been followed.⁸⁷⁹ In the English case of *W Devis & Sons Ltd v Atkins*⁸⁸⁰ the House of Lords was required to decide whether or not an employer should be allowed to rely upon facts that were unknown to it at the time of dismissal as a reason for the dismissal. Viscount Dilhorne decided that regard cannot be had to matters of which an employer was unaware at the time of dismissal and therefore could not have formed part of the reason for the dismissal.⁸⁸¹ Similarly, in *Nelson v BBC*⁸⁸² Roskill LJ held that once an employer has identified a reason for the dismissal, it cannot later assert that the dismissal was effected for another reason.⁸⁸³

⁸⁷⁵ *Dierks v University of South Africa* (1999) 20 ILJ 1227.

⁸⁷⁶ *Dierks v University of South Africa* at 1230E.

⁸⁷⁷ Misconduct committed by the employee and the employer's operational reasons are for instance considered as factors militating against the creation of a reasonable expectation. See the discussion under 2.3 in Ch 3.

⁸⁷⁸ *Van Biljon v Bloemfontein Transitional. Local Council.* (1999) 20 ILJ 2481 (CCMA) at 2483.

⁸⁷⁹ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1029.

⁸⁸⁰ *W Devis & Sons Ltd v Atkins* [1977] AC 931.

⁸⁸¹ *W Devis & Sons Ltd v Atkins* at 952.

⁸⁸² *Nelson v BBC* [1977] 1 ICR 649.

⁸⁸³ *Nelson v BBC* at 657.

The same principle should apply in South Africa. If an employer did not have a fair reason to dismiss the fixed term employee in the first place, it should not be permitted to find another reason after the fact. Even if 'another reason' (i.e. not that the fixed term contract had simply lapsed) could be raised, an employer would still need to prove that the proper procedure as prescribed in the Code of Good Practice: Dismissal in respect of the particular type of dismissal had been adhered to. If the employer had relied upon the lapse of the agreement, the probability is that the prescribed procedure would not have been followed rendering the dismissal unfair.

This evidences a clear problem in the dispute resolution system applicable to fixed term employees. Little attention has been paid to providing guidelines to employers to ensure that fixed term employees are not unfairly dismissed. Appropriate guidelines for substantive and procedural fairness of dismissal of fixed term employees have not been provided in the Code of Good Practice: Dismissal. Employers are often ignorant of procedural measures that they are required to follow until they are published and become generally enforceable.⁸⁸⁴ The Code of Good Practice: Dismissal has never included stipulations pertaining to dismissal of atypical employees, thus creating a loophole for employers.

The Code of Good Practice: Dismissal seems to be lacking specific reference to this type of dismissal where it is clearly necessary. Since employers use the Code of Good Practice: Dismissal as a guideline for employment policies, it would have been very useful to include a specific procedure to follow in case of termination of fixed term contracts of employment against which the CCMA could test the fairness of the dismissal.

3.2.2 The cause for an automatically unfair dismissal must be the proximate or only reason

If a fixed term employee claims that the dismissal was automatically unfair, he or she will have to produce sufficient evidence to prove a credible possibility that one of the circumstances envisaged in s 187 of the LRA had occurred. If more than one possible

⁸⁸⁴ Bhorat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' at 38.

reason existed for the dismissal, the court will have to determine whether one of these circumstances was the 'dominant' or 'more likely' reason for the dismissal.⁸⁸⁵

The matter of *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*⁸⁸⁶ serves as an example. In this case, the fixed term employee claimed to have been dismissed for reasons related to her pregnancy after having worked a three months' probation period.⁸⁸⁷ She alleged that a reasonable expectation of permanent appointment had been created by the employer. The fixed term employee claimed that an automatically unfair dismissal had occurred as the employer had discriminated against her, based on the fact that she is female and/or pregnant. The matter was referred to the LC for adjudication. The court held that the employee had successfully proven that she had a reasonable expectation of renewal based on a promise that she would be considered for permanent appointment after a three month probation period. Consequently, it was held that the employee had been dismissed.⁸⁸⁸

However, the court held that the employee had failed to prove that her pregnancy was the primary reason for the dismissal. The last renewal had been affected while the employer had been fully aware of her pregnancy.⁸⁸⁹ The fixed term employee's contention that she had been dismissed on the basis of her sex was rejected since the employer had, in the past, employed numerous women including pregnant women.⁸⁹⁰ As the reason for the dismissal was not held to have been related to a ground listed in s 187 of the LRA, the matter was referred back for arbitration to the CCMA to decide on the fairness of the dismissal.⁸⁹¹

The effect of the referral back to the Commission to decide on the fairness is a delay in the finalisation of the matter. It is apparent that automatically unfair dismissal matters also bring about more technical and legal considerations than ordinary dismissals do.

⁸⁸⁵ *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at para 29. *Wallace v Du Toit* [2006] 8 BLLR 757 (LC) at paras 5 & 16.

⁸⁸⁶ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC).

⁸⁸⁷ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 410E and 422A – 423G.

⁸⁸⁸ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 420D.

⁸⁸⁹ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 423G – 424A.

⁸⁹⁰ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 424C – E.

⁸⁹¹ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 424F.

3.2.3 Factors considered in establishing whether or not a reasonable expectation was created

Factors indicative of and negating from the existence of a reasonable expectation for purposes of s 186(1)(b) of the LRA may be deduced from circumstances arising throughout the course of employment. What factors are considered in establishing the existence of a reasonable expectation is closely connected to the facts of each matter. Some of the factors to take into account in assessing whether an expectation of renewal of a fixed term contract was present are enunciated in *Dierks v University of South Africa*⁸⁹² by Oosthuizen AJ. These factors include

‘all the surrounding circumstances, the significance, or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and (sic) nature of employer’s business.’

In *SA Rugby (Pty) Ltd v CCMA & others*⁸⁹³ Gering AJ considered the express terms of the contract, the nature of the employment, the reason for the initial conclusion of a fixed term appointment and failure to give reasonable notice of non-renewal of the contract.⁸⁹⁴ The necessity of the work,⁸⁹⁵ the availability of work,⁸⁹⁶ the availability of money to remunerate the employee for his or her services, past performance in terms of the fixed term contract, previous renewals⁸⁹⁷ and representations made by the employer or its authorised agents have also been included as factors to take into account.⁸⁹⁸

The written provisions of the contract play an important part in the evaluation of the existence of a reasonable expectation, but are not decisive. The totality of the evidence

⁸⁹² *Dierks v University of South Africa* at para 17.

⁸⁹³ *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC) at 1042.

⁸⁹⁴ Grogan *Workplace Law* (2009) at 150. See also *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC) at 1042B – C and *Truter v Mechem: A Division of Denel (Pty) Ltd* (1997) 18 ILJ 803 (CCMA) at para 46. See also in general *Ranchod v University of Limpopo* (2007) 28 ILJ 1174 (CCMA), *Fuhri v Anglo Building Tshwane (Pty) Ltd* [2007] 1 BALR 25 (CCMA) and *Gila v Kwikhot (Pty) Ltd* [2007] 8 BALR 681 (MEIBC).

⁸⁹⁵ See *FGWU & others v Letabakop Farms (Pty) Ltd* (1995) 16 ILJ 4; [1996] BLLR 23 (IC) at 30F and *Zank v Natal Fire Protection Association* at 116D.

⁸⁹⁶ See for instance *Bottger and Ben Nomoyi Film & Video CC* [1997] 5 BLLR 621 (CCMA) at 624 where the employee was held to be unfairly retrenched since the employer failed to prove that the work the fixed term employee was appointed for was completed.

⁸⁹⁷ The fact that a fixed term contract has been renewed is not in itself indicative of a reasonable expectation of renewal. A repeated renewal probably proportionately increases the conception of the creation of a reasonable expectation. Grogan *Workplace Law* (2009) at 150. See also Olivier ‘Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments’ at 1027.

together with the surrounding circumstances should be considered even if a contractual provision expressly excludes an expectation.⁸⁹⁹ In *Scholtz & others and Bantony Trading CC t/a Dynamic Labour Brokers & Placement Consultants*⁹⁰⁰ it was held that contractual agreements and legal principles must be considered, but that the conduct between the parties and other surrounding circumstances should also be taken into account.

In some cases, the courts have excluded the possibility that a reasonable expectation could have existed because of factors that seem to obstruct the contention. As all surrounding circumstances and the facts of each particular matter are considered, it is impossible to provide a complete list of circumstances which the court would consider as creating or negating a reasonable expectation of renewal. Some of the factors that the courts have considered either as supporting or detracting from a reasonable expectation for purposes of s 186(1)(b) of the LRA are briefly discussed below.

3.2.3.1 Express terms barring the possibility of a reasonable expectation

Employers are not permitted to contract out of their legislative obligations.⁹⁰¹ In terms of the LRA employers and employees are prohibited from coming to an agreement which has the effect of limiting an employee's statutory rights.⁹⁰² Limitation of an employee's right to protection against unfair dismissal conflicts with applicable case law and falls foul of their fundamental right to fair labour practices.⁹⁰³ The question arises as to whether or not it is possible for an employer to exclude the possibility of a reasonable expectation or avoid unfair dismissal claims in terms of s 186(1)(b) of the LRA by reaching an agreement with the fixed term employee to such effect upon his or her appointment.

⁸⁹⁸ *King Sabata Dalinyebo Municipality v CCMA & others* (2005) 26 ILJ 474 (LC) at paras 4 - 6.

⁸⁹⁹ *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* 19 ILJ 731 (SCA) at 733 – 734. See also *Dierks v University of South Africa* (1999) 20 ILJ 1227 at para 161 and *Zank v Natal Fire Protection Association* at para 20.

⁹⁰⁰ *Scholtz & others and Bantony Trading CC t/a Dynamic Labour Brokers & Placement Consultants* (2002) 23 ILJ 1631 (CCMA) at 1639 - 1640.

⁹⁰¹ The Labour Court in *Mahlamu v CCMA & others* (2011) 32 ILJ 1122 (LC) at paras 21 – 22 decided that it is impermissible for parties in a labour relationship to contract out of the rights that are entrenched in the legislation. In *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) at para 61 the Labour Appeal Court held that it is impermissible for contracting parties in an employment relationship to contract out of the LRA and the benefits which the legislation intends to provide to employees.

⁹⁰² Sections 4 & 5 of the LRA.

In the *SA Post Office v Mampeule*⁹⁰⁴ the LC and the LAC held that contracts providing for automatic termination conflict with the objects of the LRA.⁹⁰⁵ Such contracts cannot be relied upon by employers when employees allege that they have been dismissed. A clause that has the effect of excluding the possibility of a reasonable expectation of renewal could be *contra bonos mores* and declared unenforceable.⁹⁰⁶

3.2.3.2 Public policy

Normally constitutional challenges to contractual terms will raise the question whether or not the disputed provisions are contrary to public policy. Public policy is a reflection of the community's legal convictions. The content of public policy is not always simple to establish. But, the values that underlie the Constitution provide useful guidance. A contractual term which infringes on a constitutional right will be against public policy and unenforceable even though the parties had consented to it.⁹⁰⁷ When interpreting and applying the statutory unfair dismissal protection, presiding officers are not bound by contractual constraints which may have been reached by the parties if the terms of the agreements are such that they conflict with the rights as contained in the Bill of Rights.⁹⁰⁸

Abuse of fixed term contracts to avoid legal obligations will not be tolerated even if there is apparent consensus between the parties on termination. In *Sasfin (Pty) Ltd v Beukes*⁹⁰⁹ the court held that if a court refuses to enforce a legally binding contract, it ultimately does so according to the dictates of public policy. The court however specified that it would not readily declare a contractual provision void for reasons of it being contrary to public policy.⁹¹⁰ In *Barkhuizen v Napier*⁹¹¹ the court held that if a

⁹⁰³ *SA Post Office Ltd v Mampeule* (2009) 30 ILJ 664 (LC) at paras 45 - 46. See also *Igbo v Johnson Mathey Chemicals Ltd* [1986] IRLR 215 (CA).

⁹⁰⁴ *SA Post Office v Mampeule* [2009] 8 BLLR 792 (LC) at para 46 and *SA Post Office v Khutso Mampeule* LAC Case no. JA29/09 (unreported) at paras 5 & 23.

⁹⁰⁵ See also *Chilibush Communications (Pty) Ltd v Johnston NO & others* (2010) 31 ILJ 1358 (LC) at 1360G - I where this view is supported with reference to ss 5(2)(b) and 5(4) of the LRA. See also *SA Post Office v Khutso Mampeule* LAC Case no. JA29/09 (unreported) at para 22.

⁹⁰⁶ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at paras 27 - 30. In this case the court considered when a restraint of trade clause in an employment contract is unreasonable and consequently contrary to public policy.

⁹⁰⁷ *Barkhuizen v Napier* [2007] 7 BCLR 691 (CC) at paras 29 - 30.

⁹⁰⁸ *Simon Nape and INTCS Corporate Solutions (Pty) Ltd* Labour Court Case No. JR617/07 at para 66.

⁹⁰⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8F & 9.

⁹¹⁰ *Sasfin (Pty) Ltd v Beukes* at 9B - C. See also *Jajbhay v Cassiem* 1939 AD 537 at 558.

⁹¹¹ *Barkhuizen v Napier* [2007] 7 BCLR 691 (CC).

provision contained in a contract conflicts with the Constitution, the court may declare it void or unenforceable for being contrary to public policy.⁹¹²

In my opinion, an express term denying a fixed term employee statutory employment rights would fall foul of the restrictions contained in the legislation concerning contracting out of statutory obligations. To exclude the possibility of a reasonable expectation in an employment contract and to enforce such exclusion would be contrary to public policy. This would constitute a harsh and improper restriction on a fixed term employee's right to participate freely in the economy.⁹¹³

In *Vorster v Rednave enterprises CC t/a Cash Converters Queenswood*⁹¹⁴ it was held by Basson J that despite the inclusion of a clause excluding the possibility of a reasonable expectation, the court is required to consider all the surrounding circumstances in order to determine whether or not an expectation had been created. Likewise in *SA Rugby (Pty) Ltd v CCMA*⁹¹⁵ the LC held that a reasonable expectation can be present despite the inclusion of a provision that the employee fully understands that there can be no expectation of renewal of the particular fixed term contract.⁹¹⁶

In *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing and Textile Workers Union*⁹¹⁷ a clause was included in the employee's contract of employment excluding the possibility of a reasonable expectation for the renewal of the fixed term contract. The LC held that despite the inclusion of such words in a contract, a reasonable expectation could arise during employment if assurances were made by the employer that the fixed term contract would be renewed either on a temporary or on an indefinite basis.

⁹¹² *Barkhuizen v Napier* at para 29. See also *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at para 94 where Kriegler J held that because the Constitution is the supreme law of the country (s 2 of the Constitution) any conduct which is unconstitutional is null and void.

⁹¹³ Section 22 of the Constitution reads: 'Every citizen has the right to choose their trade, occupation and profession freely.' See *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 at paras 18 - 24 where the limitation of contractual freedom through public policy is considered. It should be noted that this case dealt with a clause in a suretyship contract. However, the principle applies to contracts in general. Deciding whether or not a specific restriction would be in the public interest is a policy decision to be determined by the courts after consideration of all the facts. See *S v Dlamini* 1999 (4) SA 623 (CC) at para 55 in this regard.

⁹¹⁴ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at 418I – 419B.

⁹¹⁵ *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC).

⁹¹⁶ *SA Rugby (Pty) Ltd v CCMA & others* at para 13.

⁹¹⁷ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* (1998) 19 ILJ 731 (SCA) at 733 - 734.

Therefore, a stipulation barring the possibility that a fixed term employee could have a reasonable expectation of renewal of his or her contract, does not exclude the possibility of the creation of a reasonable expectation or subsequent renewals of the fixed term contract.⁹¹⁸

However, it is evident from several cases that the wording of a contract and the fact that the fixed term employee understands that the working arrangement is temporary⁹¹⁹ plays an important mitigating role in the creation of a reasonable expectation. A clause excluding the possibility of an expectation of renewal carries considerable weight. The terms of the agreement are an important indication of what the contracting parties intended in relation to the termination of the employment relationship. By signing fixed term contracts the employees should be aware of the fact that they are not permanent employees.⁹²⁰

In *Swart and Department of Justice*⁹²¹ it was held that repeated renewals could be the basis of a claim of reasonable expectation of renewal, but not if the contractual terms are clear that the parties intended that the contract would terminate on a specific date.

In *Malinga & others and Pro-AI Engineering CC*⁹²² fixed term employees were appointed to repair equipment. Their appointments were dependent upon successful tenders from Pro-AI Engineering CC. For each contract awarded to Pro-AI Engineering, the employer would employ the fixed term employees. After signing a number of fixed term contracts, the employees objected to signing any further fixed term contracts as they wanted permanent employment. But, they continued signing fixed term contracts on their trade

⁹¹⁸ In *SA Rugby Players Association obo Bands & others and SA Rugby (Pty) Ltd* (2005) 26 ILJ 176 (CCMA) at 177A - E and in *Yebe and University of KwaZulu-Natal (Durban)* (2007) 28 ILJ 490 (CCMA) at paras 59 – 60, 78 & 83 the commissioners found a legitimate expectation of renewal of a fixed term contract was present despite the inclusion of such a term in the contract. In *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (1998) 19 ILJ 731 (SCA) at 733 - 734 it was held that, despite the wording of the fixed term contract to the effect that employees were to have no expectation of renewal, it was possible for the employees' contracts to not only be renewed, but to be converted into permanent appointments. See also *Dierks v University of South Africa* at 1246F and 1250, *SA Rugby (Pty) Ltd v CCMA & others* (2006) ILJ 1041 (LC) at para 13 and *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 418I – 419B.

⁹¹⁹ Even in the absence of a written contract, if an employee understands that the employment is temporary, this would exclude a claim that he or she believed that the employment was permanent. See *Cloud Hamandawana and Dispute Resolution Centre & others* Case no. C649/2012 (5 November 2013) at paras 16 & 18.

⁹²⁰ *SARPA obo Bands & others v SA Rugby (Pty) Ltd* (2005) 26 ILJ 176 (CCMA) at 184. See also *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 372 and *Malandoh v SABC* (1997) 18 ILJ 544 (LC) at 547.

⁹²¹ See for instance *Swart and Department of Justice* (2003) 24 ILJ 1049 at para 13.

union's insistence. When Pro-AI Engineering CC's tender was unsuccessful, the fixed term employees' employment was terminated. They referred a dispute claiming that they had a reasonable expectation of renewal of their fixed term contracts and were unfairly dismissed.

The arbitrator rejected the contention that a reasonable expectation existed based on the fact that the fixed term employees had been aware of the temporary nature of the fixed term contracts they had entered into. It was further decided that even if they had been initially employed without fixed term contracts, the employment relationship had changed the moment they signed the first fixed term contract. Accordingly, they should have lodged a dispute regarding the change if they were unhappy about it prior to signing the first fixed term contract. Since there was no evidence supporting the claim that the employer had created a reasonable expectation of renewal of the final fixed term contracts concluded between the parties, it was held that the fixed term employees had not been dismissed.⁹²³

In *Kgaile and Senforce Security Services*⁹²⁴ a fixed term employee claimed that he had been unfairly retrenched. The employer alleged that the fixed term contract had simply expired.⁹²⁵ The fixed term employee contended that somebody had indicated to him that his contract would be renewed.⁹²⁶ The commissioner rejected this vague contention since the fixed term contract which the fixed term employee had willingly signed was clear regarding the termination date and also included a stipulation that there could be no expectation of renewal. Accordingly, the fixed term employee was held not to have been dismissed.⁹²⁷

In *Tshabalala & others v Sirius Risk Management t/a Court Security*⁹²⁸ three fixed term employees claimed to have been unfairly retrenched. The fixed term employees contended that the employer had failed to abide by its policy in terminating their employment. They conceded that they had received a letter of appointment which clearly indicated that they were appointed on a fixed term basis. Two of the three fixed

⁹²² *Malinga & others and Pro-AI Engineering CC* (2003) 24 ILJ 2030 (BCA) (Tokiso).

⁹²³ *Malinga & others and Pro-AI Engineering CC* at 2034.

⁹²⁴ *Kgaile and Senforce Security Services* [2010] 12 BALR 1262 (CCMA).

⁹²⁵ *Kgaile and Senforce Security Services* at paras 6 & 8.

⁹²⁶ *Kgaile and Senforce Security Services* at paras 23 - 25.

⁹²⁷ *Kgaile and Senforce Security Services* at para 30.

⁹²⁸ *Tshabalala & others v Sirius Risk Management t/a Court Security* GAJB25208-06 accessed at www.ccm.org.za/UploadedMedia/SELECTED%20AWARDS (18 October 2013).

term employees alleged that their employment was terminated because they had lodged grievances against the employer. The other contended that he had been selectively dismissed as the employer had failed to apply the 'last in, first out' - principle. The commissioner held that the applicants understood the contents of the letter of appointment and that they had voluntarily signed it. Consequently it was held that the fixed term employees had not been dismissed.

If a fixed term employee signs a contract voluntarily, knowing that it means that he or she is only temporarily engaged it would therefore be a strong indication that he or she did not expect continuation of the employment relationship. However, it has also been held that even if a fixed term employee does not understand the content of the contract that he or she had agreed to, even if it was unsigned, it would still have a binding effect.⁹²⁹

In *Foster v Stewart Scott Inc*⁹³⁰ Froneman J held that it is unnecessary for the employer to prove that the fixed term employee understood the terms of the agreement and that the contract was of a temporary nature. The fact that the complete contract was signed is sufficient to hold the fixed term employee bound to the agreement. In *Dladla and On-Time Labour Hire CC & another*⁹³¹ the fixed term employee claimed that he did not understand the terms of the contract which he had signed. This contention was likewise rejected based on the maxim *caveat subscriptor*.⁹³² In the absence of an indication of duress or undue influence, the fixed term contract is considered to be binding if it is signed by the fixed term employee.⁹³³ But, in *Hlatwayo and Kwadukuza Municipality*⁹³⁴ it was held that if the terms of the fixed term contract is never explained or made known to the employees⁹³⁵ and they do not sign a complete contract while working on a

⁹²⁹ *Cloud Hamandawana and Dispute Resolution Centre & others* Case no. C649/2012 (5 November 2013) at paras 3.2 & 18.

⁹³⁰ *Foster v Stewart Scott Inc* at 372.

⁹³¹ *Dladla and On-Time Labour Hire CC & another* (2006) 27 ILJ 216 (BCA).

⁹³² *Caveat Subscriptor* (Latin) means 'let the signer beware'. It is a tacit warning to someone entering into a contract that in the absence of an express exclusion in the agreement, he or she is liable for all ensuing consequences and obligations. It is the responsibility of the signatory to ensure that he or she is informed of the information as contained in the contract before entering into the agreement.' US Legal Definitions accessed at <http://definitions.uslegal.com/c/caveat-subscriptor/> (12 March 2013).

⁹³³ *Dladla and On-Time Labour Hire CC & another* at 218 & 221.

⁹³⁴ *Hlatwayo and Kwadukuza Municipality* (2012) 33 ILJ 2721 (BCA).

⁹³⁵ *Hlatwayo and Kwadukuza Municipality* at paras 4.3.4 & 4.3.7.

continuous and ongoing basis for an extended period of time,⁹³⁶ the contract would not be viewed as one which is temporary.⁹³⁷

3.2.3.3 Express term providing for renegotiation of contractual terms

A clause enabling renegotiation of a fixed term contract will not be viewed as a ground for a claim based on a reasonable expectation of renewal of a fixed term contract. In *SA Bank of Athens Ltd v Cilliers NO & others*⁹³⁸ a fixed term employee claimed that the employer had created a reasonable expectation that his contract would be renewed. He argued that a clause providing for renegotiation included in the contract lead to the creation of the expectation. The employer indicated that the employee's conduct (he had acted in direct conflict with the employer's interests) was the reason why the contract had not been renegotiated. On review to the LC per Leeuw AJ commented that a clause in a contract providing that the parties will renegotiate the agreement is unenforceable.⁹³⁹ He opined that renegotiation of terms of a contract is discretionary. Such a clause would enable either of the parties to initiate renegotiation of the terms of the agreement.⁹⁴⁰ The Court held further that the fixed term employee *in casu* was aware of the fact that the employer would not be interested in appointing someone who they could not trust.⁹⁴¹ Accordingly a reasonable expectation of renewal could not have existed and the fixed term contract had simply terminated through effluxion of time.

Therefore fixed term employees would not be able to rely upon a contractual term to the effect that continued employment may be negotiated or even claim to expect that such renegotiation is enforceable on the basis of s 186(1)(b) of the LRA. However, in *Masakhane Security Services (Pty) Limited v University of Fort Hare*⁹⁴² Tshiki J granted an order declaring the employer's refusal to consider extending the contract of service with the applicant unlawful.⁹⁴³ The employment contract in this case included a clause to the effect that the appointment could be renewed for another two years.⁹⁴⁴ After the

⁹³⁶ *Hlatswayo and Kwadukuza Municipality* at para 5.2.6.

⁹³⁷ *Hlatswayo and Kwadukuza Municipality* at paras 5.3.2 & 6.

⁹³⁸ *SA Bank of Athens Ltd v Cillier NO & others* (2009) 30 ILJ 197 (LC).

⁹³⁹ *SA Bank of Athens Ltd v Cillier NO & others* 202H – J.

⁹⁴⁰ *SA Bank of Athens Ltd v Cillier NO & others* 203A – C.

⁹⁴¹ *SA Bank of Athens Ltd v Cillier NO & others* 203 – 204.

⁹⁴² *Masakhane Security Services (Pty) Limited v University of Fort Hare* [2013] JOL 30260 (ECB).

⁹⁴³ *Masakhane Security Services (Pty) Limited v University of Fort Hare* at para 3.

⁹⁴⁴ *Masakhane Security Services (Pty) Limited v University of Fort Hare* at para 8.

first year of service it became evident to the employee that the employer was not considering renewing the contract. In the court's view the clause rendering the contract renewable for another two years created a legitimate expectation in the employee's mind that his employment would be extended.⁹⁴⁵ Despite the fact that the renewability of a fixed term contract is also discretionary, it would seem as if the inclusion of a clause rendering the contract renewable would be more conducive to a finding that the employer had created an expectation of continued employment.

3.2.3.4 The reasons for appointing employees on fixed term contracts

Why an employee had initially been appointed in terms of a fixed term contract may be very significant in determining whether or not an employer had created a reasonable expectation of continuance of employment.⁹⁴⁶ Employers are not prevented in terms of the legislation from entering into fixed term contracts for illegitimate reasons until and unless non-renewal thereof is found to constitute an unfair dismissal.

South African employers are not permitted to abuse fixed term contracts in order to avoid their statutory obligations. In *Mafike and Kwikot (Pty) Ltd*⁹⁴⁷ an employer employed all of its employees on fixed term contracts. One fixed term employee's contract was terminated, while all the other's appointments were renewed. It was held that the terms of a supposed fixed term contract, which provided for automatic termination upon the happening of any one of several future events were not genuine, but merely a stunt to enable the employer to evade its legal obligations. The contract was therefore interpreted to be an indefinite contract and its termination was found to constitute a dismissal.⁹⁴⁸

In both the arbitration as well as in the Labour Court in the matter of *Gubevu Security Group Pty Ltd and Ruggiero NO & others*⁹⁴⁹ the facts showed that the fixed term contract was actually used instead of probation.⁹⁵⁰ The employer had not at any stage during the three-month period in which the employee had been appointed informed the

⁹⁴⁵ *Masakhane Security Services (Pty) Limited v University of Fort Hare* at paras 29, 32 & 34.

⁹⁴⁶ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1029.

⁹⁴⁷ *Mafike and Kwikot (Pty) Ltd* (2005) 26 ILJ 2267 (BCA).

⁹⁴⁸ *Mafike and Kwikot (Pty) Ltd* at 2271.

⁹⁴⁹ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* (2012) 33 ILJ 1171 (LC).

⁹⁵⁰ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* at para 5.

employee of any problems related to performance.⁹⁵¹ Consequently, the Labour Court per Steenkamp J concluded that a reasonable expectation of temporary renewal had been created by the employer, but that it could not be one for permanent appointment as the fixed term employee had claimed since s 186(1)(b) of the LRA would not cover such a situation.⁹⁵²

In dismissal cases in terms of s 186(1)(b) of the LRA the reason for the conclusion of the fixed term contract is often underplayed.⁹⁵³ In most cases where it has been held that a reasonable expectation had been created and where a contention that a reasonable expectation had existed had been rejected by the courts, what the motivation was for the conclusion of a temporary employment contract was not the determining factor.⁹⁵⁴

3.2.3.5 Conditions that were set for renewal have been complied with

The mere fact that promises are made by an employer that the fixed term employee's employment will be extended if certain conditions are met, has been held not to be a factor conducive to a reasonable expectation.⁹⁵⁵ However, if conditions are set for the renewal of a fixed term contract and the conditions for renewal were adhered to by the fixed term employee it may lead to a reasonable expectation of renewal.

In *Mthembu and Trans Caledon Tunnel Authority*⁹⁵⁶ the employer as a condition to renewal of the five year fixed term contract indicated that the fixed term employee must render satisfactory service.⁹⁵⁷ The fixed term employee complied with this condition and

⁹⁵¹ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* at para 9.

⁹⁵² *Gubevu Security Group Pty Ltd and Ruggiero NO & others* at para 10.

⁹⁵³ Vettori notes the fact that the reason for entering into a fixed term contract only after termination of the contract and only if a reasonable expectation of renewal is proven as one of two main weaknesses of the South African legislation since it opens the door to abuse. Justification for the reason for the fixed term appointment at the outset seems to be a more efficient and practical way of eliminating the practice of entering into fixed term contracts as a mechanism to escape labour law obligations. Vettori Stella 'Fixed-term contracts in Mozambique and South Africa' at 380 – 382.

⁹⁵⁴ A number of cases are discussed below in which it is apparent that little attention, if any, was paid to why the fixed term employee was appointed in terms of a fixed term contract in the first place. This may be as a result of the fact that the courts are reluctant to interfere in employer's business prerogative. It is presumed that employers know best what the short term and long term requirements of a business is when making appointments.

⁹⁵⁵ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 40.

⁹⁵⁶ *Mthembu and Trans Caledon Tunnel Authority* [2009] 9 BALR 934 (CCMA).

⁹⁵⁷ *Mthembu and Trans Caledon Tunnel Authority* at paras 4 & 7.

was subsequently offered a further six month fixed term appointment which she had accepted. However, there was deterioration in the working relationship and the fixed term employee lodged a grievance. At a meeting which the fixed term employee did not attend it was decided that the offer of renewal of the fixed term appointment would be retracted. Since the fixed term employee was successful in proving that she had rendered satisfactory service (the condition for continuance of her employment) and had even received a performance bonus,⁹⁵⁸ the commissioner held that the employer had created a reasonable expectation of renewal.⁹⁵⁹ The dismissal was also held to have been procedurally unfair since the employee had not been afforded a hearing before her services had been terminated.⁹⁶⁰

If a fixed term employee should comply with the conditions that are set for the renewal of his or her contract, the employer is required to provide reasons for not renewing the contract prior to termination thereof.⁹⁶¹

3.2.3.6 The availability of funds and reasonable expectation

Although it would not in itself be a conclusive test, the availability of money to pay a fixed term employee is a very important factor in establishing the objective reasonableness of an expectation of continued employment. The overall poor financial position of the employer could detract significantly from the possibility of a claim based on a reasonable expectation.

In *Myokwana v Read Educational Trust*⁹⁶² a fixed term employee claimed to have had a reasonable expectation that her one year contract would be renewed. She alleged that she was promised continuation of her services for at least another six months subject to the availability of funding for the project that she was involved on. The funder had continued paying for the project, but the fixed term contract was nevertheless terminated. The employer denied having promised a renewal of the fixed term contract in question. It contended that it had initiated a process of restructuring as a result of a

⁹⁵⁸ *Mthembu and Trans Caledon Tunnel Authority* at paras 10 & 12.

⁹⁵⁹ *Mthembu and Trans Caledon Tunnel Authority* at para 19.

⁹⁶⁰ *Mthembu and Trans Caledon Tunnel Authority* at paras 25 - 26.

⁹⁶¹ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* (1998) 19 ILJ 731 (SCA) at 735.

⁹⁶² *Myokwana v Read Educational Trust* ECEL605-06.

general decrease in funding. For this reason a number of fixed term contracts had not been renewed. The employer alleged that an opportunity was presented to the fixed term employee to consult regarding the restructuring, but that the fixed term employee chose not to attend the meeting. The commissioner held that there was insufficient proof that a reasonable expectation of renewal had been created by the employer.

In *Brown & another v Read Educational Trust*⁹⁶³ the applicant employees' fixed term contracts which had been renewed annually for a number of years were not renewed because the funds for the project had been depleted. The arbitrator was convinced that the employees were aware of the link between the funding and their work. This was considered as a factor negating the creation of a reasonable expectation.

Conversely in *Bronn & others v University of Cape Town*⁹⁶⁴ the court held that where a fixed term employee's employment is made subject to the availability of funding, the termination of his or her contract for a reason unrelated to a lack of funding would amount to a dismissal. In *Ormond v Denel Aerospace Systems*⁹⁶⁵ the arbitrator also found that the employee had a reasonable expectation of renewal despite a lack of funds, because the particular project for which the employee was appointed had not yet been completed.

Financial problems and even restructuring of the employer's business would not always negate a reasonable expectation of renewal of a fixed term contract. In *Ranchod v University of Limpopo*⁹⁶⁶ the fixed term employee was appointed in terms of several renewable fixed term contracts. When the employer failed to renew the last contract, the fixed term employee claimed that she had been unfairly dismissed. She contended that the employer had created a reasonable expectation that her fixed term contract would be renewed. Although she had been aware of the fact that the institution intended phasing out part-time employees for operational reasons, she alleged that the employer had indicated to her that she would be kept on because of her experience and long service. The employer contended that it had advised the fixed term employee to apply for a full time position, but that she had failed to do so. The employer conceded that it had sent a letter to the fixed term employee indicating that they would in exceptional

⁹⁶³ *Brown & another v Read Educational Trust* [2006] 6 BALR 605 (CCMA) at 614 - 615.

⁹⁶⁴ *Bronn & others v University of Cape Town* [1999] 4 LLD 209 (CCMA) at 210.

⁹⁶⁵ *Ormond v Denel Aerospace Systems* (2005) 26 ILJ 2494 (BCA) at 2497 - 2498.

⁹⁶⁶ *Ranchod v University of Limpopo* (2007) 28 ILJ 1174 (CCMA) at 1174C - E.

circumstances keep on part-time employees. The letter also stated that temporary eye specialists in particular might be required. Ms Ranchod was an optometry lecturer. Consequently, it was held that an expectation of appointment had been created by the employer and that an unfair dismissal had occurred.⁹⁶⁷

The availability of funds will in certain instances be viewed as conducive to the creation of a reasonable expectation. However, the fact that funding is available will not necessarily mean that a fixed term employee can expect to continue working for the employer.

3.2.3.7 Breakdown of the employment relationship

Deterioration in the employment relationship can detract from a reasonable expectation of continuance of employment. A breach of the relationship of trust and an irreparable breakdown is also considered a fair ground for dismissal in terms of the labour legislation.

In *Rakometsi v ANC Parliamentary Constituency Office*⁹⁶⁸ a fixed term employee claimed to have had a reasonable expectation of renewal of his contract because of the good quality of his work. He had also been aware of a letter that was sent to the department he was working in which urged the MPs to renew fixed term contracts. The employer claimed that there had been an irreparable breakdown in the employment relationship and that the fixed term employee had been fully aware of the fact that they intended dismissing him for misconduct. The fixed term employee argued that he could not have been dismissed without fair procedures being followed. The commissioner held that an expectation for renewal was inconsistent with the desire of members of the management committee to dismiss the applicant. Further, the deterioration in the working relationship probably rendered the continued employment relationship intolerable. Because a reasonable person in the employee's position would not have expected a renewal in the circumstances of the present matter, it was held that no dismissal had occurred.

⁹⁶⁷ *Ranchod and University of Limpopo* at 1179.

⁹⁶⁸ *Rakometsi v ANC Parliamentary Constituency Office* FS 3196-06.

Another case in which it was considered whether misconduct would justify termination of a fixed term employee's employment was *Nobubele v Kujawa*.⁹⁶⁹ In this case, a fixed term employee was suspended pending an investigation into her alleged misconduct. During the term of her suspension, the fixed term employee received a notice indicating that her fixed term contract would not be renewed.⁹⁷⁰ The employee referred a dispute alleging that she had a reasonable expectation of indefinite renewal of her fixed term contract or at least temporary renewal of the fixed term contract on the same terms.⁹⁷¹ The commissioner held that no reasonable expectation existed.⁹⁷² The Labour Court agreed with this finding.⁹⁷³ The temporary nature of the employer's business and the serious charges of misconduct which led to the fixed term employee's suspension could not, in the court's view, have induced an expectation of permanent appointment or even of renewal.⁹⁷⁴

In *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*⁹⁷⁵ the Labour Court was required to consider whether or not misconduct committed by someone related to a fixed term employee could exclude the existence of a reasonable expectation. The employer in this case claimed among other things that the fixed term employee's fiancé had assaulted one of the managers and that accordingly the fixed term employee could not have expected to continue working there. Basson J indicated that a reasonable expectation had nevertheless been established.⁹⁷⁶ This finding seems to be correct. It would be unfair to hold a fixed term employee accountable for someone else's conduct.

Employers are permitted to discipline fixed term employees for misconduct and this right is not waived if the fixed term contract is renewed.⁹⁷⁷ But, a dismissal based on misconduct is only permitted if a proper procedure is followed. An employer cannot simply decide not to renew a renewable fixed term contract for reasons related to misconduct.

⁹⁶⁹ *Nobubele v Kujawa* (2008) 29 ILJ 2986 (LC).

⁹⁷⁰ *Nobubele v Kujawa* at para 6.

⁹⁷¹ *Nobubele v Kujawa* at para 46.

⁹⁷² *Nobubele v Kujawa* at para 51.

⁹⁷³ *Nobubele v Kujawa* at paras 25 - 26 & 54.

⁹⁷⁴ *Nobubele v Kujawa* at para 50.

⁹⁷⁵ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC).

⁹⁷⁶ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 412B – C.

⁹⁷⁷ See for instance *Van der Grijp v City of Johannesburg* (2007) 28 ILJ 2079 (LC)

3.2.3.8 Retirement age and reasonable expectation

Fixed term contracts are often used to keep persons close to the statutory retirement age in employment or to employ them after they reached the ordinary retirement age.⁹⁷⁸ Section 187(1)(f) of the LRA determines that a dismissal is automatically unfair if the reason for the dismissal is that the employer discriminated against an employee on any of the grounds listed therein. However, in terms of s 187(2), a dismissal based on age would not qualify as unfair discrimination if the employee has reached the normal or agreed retirement age for persons employed in that particular capacity.

Although in the matter of *Solidarity obo Dobson v Private Security Industry Regulatory Authority*⁹⁷⁹ an employee was appointed only after the ordinary retirement age of 65 years as indicated in the employer's policy,⁹⁸⁰ her employment was later terminated because she had reached the normal retirement age. The CCMA decided that if an employer appoints someone knowing that he or she had already reached the normal retirement age and subsequently dismissed him or her for this very reason, the employer would have ignored its own policy rendering the dismissal automatically unfair.

If no retirement age is agreed upon, the employer bears the onus of proving that the age which is normal to employees employed in the same capacity as the employee concerned has been reached. If there is an agreed retirement age, employment terminates due to effluxion of time in terms of the agreement. Consequently no dismissal occurs.⁹⁸¹ In the absence of an agreed retirement age, or if the employer fails

⁹⁷⁸ Vettori Stella (ed) *Ageing Populations and Changing Labour Markets – Social and Economic Impacts of the Demographic Time Bomb* at 202 - 204. This practice is also followed in Sweden. See s 5 of the Employment Protection Act of 1982. In *SACTWU & others v Rubin Sportswear* [2004] 10 BLLR 986 (LAC) at paras 16 & 21 the Labour Court defined 'normal retirement age' as the age at which the employer requires an employee to retire and not the age at which the employee may retire if he or she wishes to do so. On appeal, the Labour Appeal Court held that if the employment contract is silent regarding the retirement age, the employer is not entitled to unilaterally impose a retirement age.

⁹⁷⁹ *Solidarity obo Dobson v Private Security Industry Regulatory Authority* [2004] 12 BALR 1546 (CCMA).

⁹⁸⁰ Notably, there is no prescribed mandatory retirement age in South Africa. Employers are free to set a 'normal' retirement age in their policies. The LRA does not require that the employer and employee agree upon an age in advance. Section 187(2)(b) determines that in the absence of an agreement the 'normal' retirement age applies. This 'normal' age would be determined with reference to the type of work and usual practice in that particular sector. See in this regard Grogan John *Workplace Law* 10th edn (Juta's Labour Library Last updated in May 2013) at 194.

⁹⁸¹ *Rockliffe v Mincom (Pty) Ltd* (2008) 29 ILJ 399 (LC) at paras 16 – 17, 19 & 26. See also *Kirsten and Southern Cross Manufacturing CO Ltd t/a Southern Cross Industries* (2006) 27 ILJ 2471 (CCMA) at 2475F.

to prove that the normal retirement age has been reached, termination of a fixed term contract based solely on age would be automatically unfair.

If an employer and employee agree upon a different retirement age than the normal retirement age,⁹⁸² dismissing the employee contrary to the agreement in the absence of another reason related to conduct, capacity or operational requirements, would constitute an unfair dismissal.⁹⁸³

3.2.3.9 Transfer of fixed term employees

The question whether or not a fixed term employee can institute a claim against his or her new employer after a transfer was posed in *Solidarity obo Smith and Denel (Pty) Ltd*.⁹⁸⁴ In this case the fixed term employee's contract had been renewed no less than ten times under the old employer before he was transferred to work for a labour broker. It was decided that a reasonable expectation cannot be 'carried over' from one employer to another. From this decision it is clear that s 186(1)(b) of the LRA is not available in all circumstances where an employee is prejudiced by non-appointment or renewal of his contract of employment despite the existence of a subjective expectation.⁹⁸⁵

The premise that a reasonable expectation cannot be transferred to a new employer was confirmed in *Hugo v Shandelier Hotel Group CC (in liquidation) & others*.⁹⁸⁶ In this case an employer sold a business as a going concern. The employer alleged that Hugo was a fixed term employee and that his contract had terminated upon the sale of the business. The commissioner held that the appointment was in actual fact not for a fixed term, but indefinite.⁹⁸⁷ Since the employee had been dismissed before the actual transfer of the business, the 'old employer' was held liable for the payment of compensation.⁹⁸⁸

⁹⁸² If an employer terminates when the fixed term employee reaches the normal retirement age, a dismissal will not be automatically unfair. See for instance *Moser Industries (Pty) Ltd v Venn* [1997] 11 BLLR 1402 (LAC) at paras 2 – 3. In *Schahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 ILJ 1333 (LC) at 1339 it was held that such a termination does not constitute a dismissal at all.

⁹⁸³ See for instance *Datt v Gunnebo Industries (Pty) Ltd* (2009) 30 ILJ 2429 (LC) at 2435F – H.

⁹⁸⁴ *Solidarity obo Smit and Denel (Pty) Ltd & another* (2004) 25 ILJ 2405 (BCA) at paras 1 & 6.1 – 6.3.

⁹⁸⁵ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at para 149.

⁹⁸⁶ *Hugo v Shandelier Hotel Group CC (in liquidation) & others* (2000) 21 ILJ 1884 (CCMA) at paras 3 - 4.

⁹⁸⁷ *Hugo v Shandelier Hotel Group CC (in liquidation) & others* at paras 47 & 87.

⁹⁸⁸ *Hugo v Shandelier Hotel Group CC (in liquidation) & others* at para 109.

It is clear from these cases that a dismissal at the instance of a third party⁹⁸⁹ does not qualify as a dismissal in terms of s 186(1)(b) of the LRA. A reasonable expectation cannot be transferred to a new employer. Once he or she stops working for someone, the expectation of continuance of his or her employment also terminates.

3.2.3.10 The fixed term employee not claiming unemployment insurance

As mentioned, employers are required to register all employees, including fixed term employees for unemployment insurance. Employers are also required to contribute to a fund for this purpose.⁹⁹⁰ Logically, someone who expects that he or she will continue working will not claim unemployment insurance.

In *Hlatswayo and KwaDukuza Municipality*⁹⁹¹ the fact that the employee who was entitled to claim unemployment payments failed to do so, was considered to be an indication that he expected that his employment with the employer would continue.⁹⁹²

The flipside of this is that if a fixed term employee claims unemployment insurance, he or she would probably not succeed in a claim based on reasonable expectation. Given the fact that fixed term employees may struggle to find other work and still be unsuccessful in their claim against the employer, denying them the minimal benefits that they are eligible for, seems very unfair.

3.2.3.11 A client no longer requires the service of a fixed term employee

In as far as temporary employment services are concerned, it is not clear whether or not it is possible to claim based on a reasonable expectation if the client indicates that the fixed term employee's services are no longer required. Since a fixed term contract can terminate upon the occurrence of a particular event or the completion of a specific task,⁹⁹³ it is in principle possible for a client to determine the task in vague terms to

⁹⁸⁹ Third party in this context refers to someone who is not the original employer in the employment relationship.

⁹⁹⁰ See the discussion in Ch 1 under 1.2.6.2.

⁹⁹¹ *Hlatswayo and KwaDukuza Municipality* (2012) 33 ILJ 2721 (BCA).

⁹⁹² *Hlatswayo and KwaDukuza Municipality* at para 5.2.11.

⁹⁹³ The ILO Convention No. 158 of 1982 on the Termination of Employment specifically provides for it in art 2(a) thereof.

allow it to terminate the employment without notice when it deems it appropriate to do so.⁹⁹⁴

In *Chokwe and Phetha Professional Services CC*⁹⁹⁵ the fixed term contract provided that the twelve month period of the contract would depend on the 'client's satisfaction and needs.'⁹⁹⁶ The arbitrator held that the inclusion of such a clause in a fixed term employment contract is contrary to public policy as a result of the operation of s 23 of the Constitution.⁹⁹⁷ Consequently it was held that the premature termination of the contract without proper consultation was unfair.⁹⁹⁸

Conversely, in *Sindane v Prestige Cleaning Services*⁹⁹⁹ the Labour Court found that a fixed term employee whose contract was terminated as a result of the fact that the employer's client under who he had been appointed to work by the employer had no longer required his services was not dismissed. In *Dladla v On-Time Labour Hire CC & another*¹⁰⁰⁰ a fixed term employee had a history of arriving late to work. The client decided not to renew the contract. The arbitrator in this case also found that the fixed term contract had simply lapsed.

Likewise, in *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group*¹⁰⁰¹ a fixed term employee whose employment was terminated because the client informed the agency for whom the fixed term employee had been working that it no longer required the fixed term employee's services, was held not to have been dismissed. The agency then withdrew the fixed term employee from the client's premises and he was not given any other assignments. The fixed term contract included a clause that the contract would terminate automatically if the client advised the agency that the fixed term employee's services were no longer required for whatever reason.¹⁰⁰² The arbitrator found that this clause had the effect that the contract terminated automatically.¹⁰⁰³

⁹⁹⁴ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247.

⁹⁹⁵ *Chokwe and Phetha Professional Services CC* (2010) 31 ILJ 3041 (CCMA).

⁹⁹⁶ *Chokwe and Phetha Professional Services CC* at para 24.

⁹⁹⁷ *Chokwe and Phetha Professional Services CC* at para 26.

⁹⁹⁸ *Chokwe and Phetha Professional Services CC* at paras 31 & 34.

⁹⁹⁹ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) at paras 4 & 18 - 19.

¹⁰⁰⁰ *Dladla v On-Time Labour Hire CC & another* (2006) 27 ILJ 216 (BCA) at 219 & 222.

¹⁰⁰¹ *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA).

¹⁰⁰² *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* at para 4.

It seems as if the courts are more inclined to find that a fixed term employee is not dismissed when the employment relationship is terminated due to the fact that the client no longer requires his or her services for whatever the reason may be. This seems very unfair. All employees are entitled to fair labour practices which includes that they should not be dismissed in the absence of a fair reason.¹⁰⁰⁴

3.2.3.12 Affirmative action and reasonable expectation

Affirmative action policies may play a role in determining whether or not an expectation that employment will continue is reasonable.¹⁰⁰⁵ If a claim in terms of s 186(1)(b) of the LRA is combined with a claim for unfair discrimination in terms of s 6 of the EEA or s 9 of the Constitution, affirmative action may be relevant. An employer could possibly raise affirmative action as a defence. A fixed term employee's unfair dismissal claim could be circumvented by the employer if it can prove that the policy or procedures followed in terminating the fixed term employee's employment were part of an affirmative action policy.¹⁰⁰⁶

The question whether or not a fixed term employee can claim that he or she expected renewal of his or her contract based on affirmative action is less clear. This piece of legislation was not aimed at conferring rights on persons who applied unsuccessfully for a position.¹⁰⁰⁷ Employers are also not obliged to prefer suitably qualified employees from designated groups.¹⁰⁰⁸ However, in *Harmse v City of Cape Town*¹⁰⁰⁹ the EEA was held not only to provide employees with protection against unfair employment policy or practices, but also a right to affirmative action. The EEA could assist in circumstances where an employer unfairly discriminates against a fixed term employee in not renewing his or her contract on the same or similar terms. However, a fixed term employee would be required to prove that his or her dignity was impaired by the discrimination.¹⁰¹⁰ In

¹⁰⁰³ *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* at para 50.

¹⁰⁰⁴ See the discussion in this regard under 1.2.2 in Ch 1 and also in 3.4.2 in Ch 4.

¹⁰⁰⁵ Jordaan B, Kalula E & Strydom (eds) *Understanding the EEA* (Juta Cape Town, 2009) 6. See in this regard *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) at 1147. See also *Public Servants Association of SA & others v Minister of Justice & others* (1997) 18 ILJ 241 (T) at 306H - 308I and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC) at 299G and *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) at 2298A - F.

¹⁰⁰⁶ Section 6(2)(a) and (b) of the EEA. Grogan *Employment Rights* (2010) at 115.

¹⁰⁰⁷ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 47.

¹⁰⁰⁸ See for instance *Thekiso v IBM South Africa (Pty) Ltd* (2007) 28 ILJ 177 (LC) at para 47 and *Henn v SA Technical (Pty) Ltd* (2006) 27 ILJ 2617 (LC).

¹⁰⁰⁹ *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) at paras 44 - 46.

¹⁰¹⁰ *Stojce v University of KwaZulu-Natal* (2006) 27 ILJ 2696 (LC) at 2696 - 2697.

addition he or she would need to prove that had it not been for the discriminatory appointment made by the employer, he or she would have been appointed.¹⁰¹¹

In certain instances the court will order the appointment of someone who is not earmarked to be appointed according to affirmative action targets. *Willemse v Patelia NO & others*¹⁰¹² serves as an example. In this case there was no equity plan in the workplace and even if there was an affirmative action programme in place, the numerical targets had already been met.¹⁰¹³ The court did not accept the employer's defence and ordered the employer to appoint the employee who had been unsuccessful in his application to the post.¹⁰¹⁴

In *McInnes v Technikon Natal*¹⁰¹⁵ the fixed term employee was employed in terms of two successive fixed term contracts and a final one-year contract.¹⁰¹⁶ The post which she had filled was converted into a permanent position. The fixed term employee applied for the permanent position and believed that she would be appointed because she was the preferred choice of the selection committee. The selection committee's initial decision to appoint her was subsequently overturned based on the employer's affirmative action policy.¹⁰¹⁷ In the alternative to her main claim based on unfair dismissal in terms of s 186(1)(b) of the LRA, the fixed term employee claimed that the employer had unfairly discriminated against her. The court held that affirmative action was not a fair reason for dismissing an employee. It found that the employer had failed to apply its affirmative action policy. Accordingly, the appointment of the other candidate did not accord with the employer's affirmative action policy or its appointment policy. Since the candidate who had been appointed to the permanent position had since left, the court ordered re-instatement of the employee and the payment of back pay for the remuneration the employee would have received had she initially been appointed.¹⁰¹⁸

The case law discussed above does not indicate that a fixed term employee who does not qualify as a designated employee would be entitled to renewal of his or her contract in instances where there is an operational affirmative action policy in the workplace.

¹⁰¹¹ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC) at para 58.

¹⁰¹² *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) at paras 21 - 22, 29 & 33.

¹⁰¹³ *Willemse v Patelia NO & others* at paras 18 & 35 - 36.

¹⁰¹⁴ *Willemse v Patelia NO & others* at paras 8 & 93.

¹⁰¹⁵ *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

¹⁰¹⁶ *McInnes v Technikon Natal* at 1140A – B.

¹⁰¹⁷ *McInnes v Technikon Natal* at 1140F – J.

Notwithstanding a recommendation by a selection committee, affirmative action may be raised as a valid reason for not appointing a person who may be the most suitable candidate for appointment.

Therefore, in some cases an employer¹⁰¹⁹ would be able to raise the fact that the aggrieved fixed term employee does not fall within the category of designated employees that he intends to protect in terms of a finely tuned affirmative action policy. The link between the employment practice and the goal should be clear. Affirmative action measures should also be tailored in such a fashion so as to prevent undue prejudice to those not covered by it.¹⁰²⁰

Although the EEA does not indicate different degrees of disadvantage,¹⁰²¹ the courts seem to have accepted that some classifications of 'designated employee' were historically discriminated against more seriously.¹⁰²² Someone who falls within a 'less disadvantaged' classification can claim based on a reasonable expectation of appointment in instances where he or she is the most suitable candidate. This would only be possible if the employment equity policy does not provide specifically for preferential treatment of certain members of the designated groups.¹⁰²³

¹⁰¹⁸ *McInnes v Technikon Natal* at 1141B – D.

¹⁰¹⁹ Differential treatment must be capable of withstanding constitutional scrutiny. An employer bears the onus of proving that its conduct was not discriminatory or to justify the discrimination so as to prove that it was not unfair under the circumstances.

¹⁰²⁰ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 135. In *Visser v Minister of Justice & Constitutional Affairs & others* 2004 (5) 183 (T) at 187I – 190F Swart J held that affirmative action at all costs, i.e. without justifiable and rational reasons will not be condoned. For a further discussion on the rationality requirement see Grogan *Employment Rights* (2010) at 255 – 256.

¹⁰²¹ See in general Rycroft Alan 'Obstacles to Employment Equity? The Role of Judges and Arbitrators and Implementation of Affirmative Action Policies' (1999) 20 *Industrial Law Journal* 1411.

¹⁰²² *Public Service Association and Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 (unreported) (21 May 1998).

¹⁰²³ As the Constitutional Court per O'Regan J pointed out in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at para 40, the apartheid system 'systematically discriminated against black people in all aspects of social life.' Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 percent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civil amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. See generally Coleman Max (ed) *A Crime against Humanity: Analysing the Repression of the Apartheid State* (Human Rights Commission – Trade Paperback 1998) and Jacobs Nancy J *Environment, Power and Injustice: A South African History* (Cambridge: Cambridge University Press 2003).

3.2.3.13 Inherent requirement and reasonable expectation

A discriminatory policy or practice could be justified if the employer is capable of proving that the discrimination was due to an inherent requirement of the specific job.¹⁰²⁴ However, before an employer will be excused for dismissing such an employee it would have to be proven that the employee's ability to perform his or her duties was negated, or the safety of the public or other employees would be in jeopardy or that keeping the fixed term employee on would cause undue practical hardship to the employer in the circumstances.¹⁰²⁵

It is difficult to imagine that an employer would be able to successfully rely upon the fact that an inherent requirement of a job required dismissal of the fixed term employee or the appointment of someone else if the fixed term employee can successfully prove that he or she had a reasonable expectation of renewal.

3.3 The nature of the expectation

There have been contrasting decisions as to whether or not a fixed term employee can base a claim in terms of s 186(1)(b) of the LRA if he or she claims based on the existence of a reasonable expectation of permanent appointment.¹⁰²⁶ Whether or not a fixed term employee may have both a claim for indefinite appointment and temporary renewal at once or will be able to claim in the alternative is also uncertain.

A fixed term employee's subjective expectation regarding the renewal of his or her contract is important in determining whether or not a reasonable expectation existed for purposes of s 186(1)(b) of the LRA. To prove a subjective expectation also entails proving that the employer or its authorised agent objectively created the expectation. A reasonable person in the fixed term employee's position should have shared the expectation that the contract would be renewed on the same or similar terms.¹⁰²⁷ The

¹⁰²⁴ Section 187(2)(a) of the LRA determines that a dismissal will not be unfair in such circumstances.

¹⁰²⁵ *Department of Correctional Services & another v Police and Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) at para 25.

¹⁰²⁶ *Swart and Department of Justice* at para 17.

¹⁰²⁷ The fixed term employee should have expected that which a rational and just person would have expected in the circumstances. *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC) at 1042G - H.

test of a reasonable expectation is objective and both the interests of the employee and the employer are taken into account.¹⁰²⁸

In *Nobubele v Kujawa*¹⁰²⁹ the court stressed the fact that it is not possible to simultaneously entertain two different expectations. A fixed term employee can either expect to be permanently appointed or expect temporary renewal of the fixed term contract, but not both.¹⁰³⁰

In *Dierks v University of South Africa*¹⁰³¹ the fixed term employee had been employed to replace another employee that was on study leave. The fixed term employee's final fixed term contract was terminated despite the fact that the employee who he was filling in for had not returned to work.¹⁰³² The fixed term employee contended that the employer had created a reasonable expectation that he would be permanently employed or that his contract would at least be renewed until the person he had been replacing returned to work. The court did not deal specifically with the question as to whether both these expectations could be entertained simultaneously. But, the fixed term employee was unsuccessful in his claim and it was held that an expectation of permanent appointment did not fall under the auspices of s 186(1)(b) of the LRA.¹⁰³³ The court in this case did not consider whether the employer was obliged to keep the fixed term employee on until the person whom he had been replacing returned.

In *McInnes v Technikon Natal*¹⁰³⁴ the fixed term employee claimed the existence of a reasonable expectation of permanent appointment. In the alternative she claimed that she expected that her contract would be renewed for another year where after it would be converted into a permanent appointment. Although Penzhorn AJ conceded that it is possible to claim in the alternative, he rejected the notion that it is possible to entertain more than one subjective expectation at a time.¹⁰³⁵

¹⁰²⁸ *Swart and Department of Justice* at para 14.

¹⁰²⁹ *Nobubele v Kujawa* (2008) 29 ILJ 2986 (LC).

¹⁰³⁰ *Nobubele v Kujawa* at para 50.

¹⁰³¹ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC).

¹⁰³² *Dierks v University of South Africa* at 1250E.

¹⁰³³ *Dierks v University of South Africa* at paras 48 - 49 which reads "In my view, an entitlement to permanent employment cannot be based simply on the reasonable expectation of section 186(b) (now 186(1)(b) of the LRA) i.e. an applicant cannot rely on an interpretation by implication or 'common sense.' It would require a specific statutory provision to that effect, particularly against the background outlined above." See also Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts' at 1006.

¹⁰³⁴ *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

¹⁰³⁵ *McInnes v Technikon Natal* at 1142F - J.

Although the decisions in *Dierks* and *McInnes* discussed above illustrate that it should not be impossible for someone to claim the existence of both an expectation of permanent appointment or at least renewal, this does not seem to be well accepted by our courts.

In *Gubevu Security Group Pty Ltd and Ruggiero NO & others*¹⁰³⁶ the Labour Court confirmed a commissioner's finding that, despite the fact that the fixed term employee had at all times claimed the existence of a reasonable expectation of permanent employment, she in fact had a reasonable expectation of temporary renewal. This decision seems to go against the grain of the court's general stance that a person cannot entertain more than one expectation at the same time. The case is very strange in the sense that it upheld the arbitrator's decision that it may be inferred that the employee had a reasonable expectation of temporary renewal instead of indefinite renewal. This was certainly not what the fixed term employee had pleaded. It can only be speculated that the court considered the potential unfairness of denying the employee a remedy for unfair dismissal.

The decision in *University of Pretoria v CCMA & others* (LAC)¹⁰³⁷ seems to have mooted the controversy. Section 186(1)(b) of the LRA is only available if temporary renewal is expected although it is possible for a fixed term employee to have a reasonable expectation of being permanently appointed.¹⁰³⁸

3.4 Defences arising from the wording of s 186(1)(b) of the LRA

The LRA envisages that the refusal or failure to continue with a fixed term employee's employment may take one of two forms to qualify as a dismissal: If the employer did not renew the contract or the renewal was qualified by an offer to renew it on less favourable terms.

¹⁰³⁶ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* (2012) 33 ILJ 1171 (LC).

¹⁰³⁷ In *University of Pretoria v CCMA & others* [2011] ZALAC 25 (LAC) at para 20 the court suggests that if the fixed term employee had not been offered a temporary renewal of her fixed term contract she would perhaps have enjoyed the remedies provided for under s 186(1)(b) of the LRA.

¹⁰³⁸ See the discussion under 3 in Ch 5.

3.4.1 An offer to renew a fixed term contract

If the employer offered to continue employing a fixed term employee on terms no less favourable than his or her previous contract, such a fixed term employee would not have been dismissed and consequently he or she would not be entitled to any remedies. Therefore, an employer who offers a fixed term employee a new contract on different terms than before, could be provided with sanctuary against an unfair dismissal claim in terms of s 186(1)(b) of the LRA.¹⁰³⁹ It is left up to the presiding officer to decide whether or not an offer on new terms should have been accepted by the employee. Arguably, with the benefit of retrospect, the presiding officer could find that a fixed term employee would have accepted an offer even on worse terms than the previous engagement. If, for instance, a fixed term employee did not manage to find other employment after his or her dismissal, employment on any terms would look better than no employment at all.¹⁰⁴⁰

However, a fixed term employee who has a reasonable expectation of permanent employment has a stronger expectation than someone who merely expects a fixed term contract to be renewed on the same terms. If an employee had a reasonable expectation that his or her employment would continue indefinitely and an employer offers to renew the contract temporarily, the employee would be dissatisfied. In my opinion, absolving such an employer's conduct from judicial scrutiny would be a travesty of justice. If there had been an offer of temporary renewal of the fixed term contract, even on better terms, but the fixed term employee had framed his or her claim on a reasonable expectation of permanent appointment and has succeeded in proving the existence of such an expectation, the offer of renewal on a temporary basis should be of no relevance.¹⁰⁴¹

A reasonable expectation of permanent employment is not an expectation of a temporary renewal on exactly the same terms. But, the inclusion of the words 'or similar'

¹⁰³⁹ See also the discussion under 5.3 in Ch 5. Currently it is accepted by the courts that someone having a reasonable expectation of permanent appointment is not protected by s 186(1)(b) of the LRA.

¹⁰⁴⁰ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* at para 2. In this case the court subtracted an amount equal to one month's salary from the compensation awarded since the employer had offered to employ her for a further month. In *University of Pretoria v CCMA & others* [2011] ZALAC 25 (LAC) at para 20 the court suggests that if the fixed term employee had not been offered a temporary renewal of her fixed term contract she would perhaps have enjoyed the remedies provided for under s 186(1)(b) of the LRA.

¹⁰⁴¹ *University of Pretoria v CCMA & others* LC Case no. JA 38/10 (Unreported) at paras 39 – 41.

in s 186(1)(b) of the LRA cannot reasonably make it a requirement that the terms need to be identical to those of the original contract.¹⁰⁴²

Once a contract has been renewed, a reasonable expectation of subsequent renewal emanates, which through continual renewals may culminate into an obligation to renew indefinitely.¹⁰⁴³ This approach accords with the constitutional purpose of s 186(1)(b) of the LRA to ensure that an employee is not denied the right to a fair dismissal through contractual arrangements that are imposed by employers' intent on avoiding their constitutional and statutory obligations.¹⁰⁴⁴

In *Van Blerk and Tshwane University of Technology*¹⁰⁴⁵ this view was supported. The commissioner opined that to hold otherwise would render the relief offered by the provision nugatory since reinstating a fixed term employee on another temporary contract would not solve the problem if he or she had expected permanent appointment. Once the next fixed term contract lapsed, another expectation would have been created and a new dispute of the same kind would arise.

If an offer is made and a person to whom it is addressed accepts the terms as contained in the offer, the parties would have contracted with each other. A contract is concluded once the acceptance of the offer has been communicated to the person who made the offer.¹⁰⁴⁶

¹⁰⁴² This was acknowledged by the commissioner in *Geldenhuis v University of Pretoria* (2008) 29 ILJ 1772 (CCMA) at 1776.

¹⁰⁴³ However, see *Magubane & others v Amalgamated Beverages* (1997) 18 ILJ 1112 (CCMA) in which the commissioner held that no evidence was produced that a reasonable expectation had been created, despite the fact that the fixed term employee's contract had been renewed no less than six times.

¹⁰⁴⁴ Revelas J in *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC) at 1961A – B opined that the purpose of s 186(1)(b) of the LRA is to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security so that when the employer wishes to dismiss the employee the obligations imposed on the employer in terms of the LRA need not be adhered to. In *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA) at para 18 the consequence of s 186(1)(b) was held to bestow a new remedy upon fixed term employees in addition to full performance of contractual obligations, to renew a contract where a reasonable expectation exists. Similarly, in *Mafike and Kwikot (Pty) Ltd* 2005 ILJ 2267 (BCA) at 2271 the arbitrator found that in the circumstances, it was evident that the expiry dates of the fixed term contracts were not intended to be genuine, but were inserted merely to enable the employer to evade its obligations in terms of applicable labour laws. The arbitrator consequently concluded that the contract had to be construed as being for an indefinite or permanent duration. See also Vettori 'Fixed term employment contracts: The permanence of the temporary' *Stell LR* (2008) Vol 2 189 at 208.

¹⁰⁴⁵ *Van Blerk and Tshwane University of Technology* (2012) 33 ILJ 1284 (CCMA) at 1031.

¹⁰⁴⁶ Christie *The Law of Contract in South Africa* (2006) 29. See also *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 579D, *Roberts & another v Martin* 2005 (4) SA 163 (C) at 167H - I and *Solomons and Skyport Corporation Ltd* (2007) 28 ILJ 2871 (CCMA) at 2872C - D.

An offer cannot be withdrawn after it has been accepted. This premise is illustrated in *Botha and Chubb Security South Africa (Pty) Ltd*.¹⁰⁴⁷ In this case the employer had offered Botha the post which he had filled prior to his resignation telephonically on terms and conditions of employment that were basically the same as those under which he had been engaged previously.¹⁰⁴⁸ Botha accepted the offer of employment over the phone. The employer proceeded to e-mail a draft employment contract to him. However, since Botha had gone on holiday he did not receive the e-mail.¹⁰⁴⁹ While Botha was gone, but before the date indicated as the cut-off date to accept the contract, the employer proceeded to appoint someone else in the position which it had offered to Botha.¹⁰⁵⁰ Botha instituted a claim based on unfair dismissal against the employer. The commissioner found that an unconditional offer and acceptance had already occurred over the phone. There had been consensus between the parties regarding all material terms and conditions of the employment relationship. Consequently, the commissioner held that a procedurally unfair dismissal had occurred.¹⁰⁵¹

In the absence of the intention to contract, a true offer to contract cannot exist.¹⁰⁵² In addition, if the employer fails to provide details regarding the essential terms of the agreement, it would probably not constitute a complete, unqualified offer but could be considered by the presiding officer as part of the negotiations.¹⁰⁵³

Once accepted, an employer will not be allowed to revoke its offer of employment without legal consequence. In *Nxumalo v Microsoft SA (Pty) Ltd*¹⁰⁵⁴ the commissioner held that an employee had been unfairly dismissed since the employer revoked its offer to appoint her ten days after she had accepted the offer.

¹⁰⁴⁷ *Botha and Chubb Security South Africa (Pty) Ltd* [2013] JOL 30409 (CCMA).

¹⁰⁴⁸ *Botha and Chubb Security South Africa (Pty) Ltd* at paras 8 & 16.

¹⁰⁴⁹ *Botha and Chubb Security South Africa (Pty) Ltd* at para 10.

¹⁰⁵⁰ *Botha and Chubb Security South Africa (Pty) Ltd* at para 20.

¹⁰⁵¹ *Botha and Chubb Security South Africa (Pty) Ltd* at paras 28 & 30.1.

¹⁰⁵² See for instance *Brolaz Projects (Pty) Ltd v CCMA* (2008) 29 ILJ 2241 (LC) at para 24 in which a serious offer was required. See also *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 991G.

¹⁰⁵³ *Mncube and Transnet* (2009) 30 ILJ 698 (CCMA) at paras 15 & 21.

¹⁰⁵⁴ *Nxumalo v Microsoft SA (Pty) Ltd* CCMA GAJB15232-06.

3.4.2 Substantive and procedural fairness

Section 186(1)(b) of the LRA does not stipulate that a dismissal would be unfair once it established that the employer had created a reasonable expectation that the aggrieved employee's services would continue. It merely states that a dismissal would have occurred. To establish a dismissal requires proof of a reasonable expectation of renewal. Employers can still raise other reasons for not abiding by the reasonable expectation and be exonerated.

Once a fixed term employee successfully proves that he or she had been dismissed, the employer can still prove that the dismissal was for a fair reason (any of the substantive grounds in the LRA) and in accordance with the prescribed procedure.¹⁰⁵⁵

An employer would be able after the fact to raise another reason¹⁰⁵⁶ for the dismissal in order to prove that the termination of employment was in actual fact fair despite the fact that it had, in the court's eyes, created a reasonable expectation that the employment relationship would continue. The employer is required to prove that the dismissal was effected for a fair reason related to either the employee's conduct or capacity, or based on the employer's operational requirements.¹⁰⁵⁷ A dismissal would also be unfair if not effected in accordance with a fair procedure.¹⁰⁵⁸ This requires consideration of the Code of Good Practice: Dismissal.¹⁰⁵⁹

3.4.2.1 Reasons related to the fixed term employee's conduct

Dismissal is permitted for reasons of misconduct. But it is very unlikely that the timing of the misconduct and finalisation of the required disciplinary process will match up with

¹⁰⁵⁵ Section 188(1) read with s 192(2) of the LRA. See also *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at 420E – F.

¹⁰⁵⁶ In *Samancor Ltd v Metal & Engineering Industries Bargaining Council* (2009) 30 ILJ 389 (LC) at 396G - H & 397D – F. Francis J observed that if an employer indicates a reason for the dismissal, the employer has to prove that the dismissal was for a fair reason and that a fair procedure had been followed. Procedural fairness must be tested against the Code of Good Practice: Dismissal in schedule 8 to the LRA which was published in terms of s 203 of the LRA.

¹⁰⁵⁷ See item 2.1 of the Code of Good Practice: Dismissal in Sch 8 to the LRA.

¹⁰⁵⁸ Section 188(2) of the LRA.

¹⁰⁵⁹ Section 138(6) of the LRA. A commissioner has to consider Codes of Good Practice and guidelines issued in pursuance of the provisions of the LRA that are applicable.

the natural end of the fixed term contract.¹⁰⁶⁰ Unless an employer is capable of proving that a fair procedure preceded the dismissal based on misconduct, it would constitute an unfair dismissal. The LRA does not generally oblige an employer to provide reasons for any type of dismissal. The Code of Good Practice: Dismissals determines that, after an employee has been informed of the allegations against him or her and has been afforded an opportunity to respond, if the employee is dismissed for misconduct, he or she should be provided with reasons for dismissal.¹⁰⁶¹ A fixed term contract cannot be abused to terminate employment in lieu of disciplinary action.¹⁰⁶²

In *Zank v Natal Fire Protection Association*¹⁰⁶³ the employer sought to justify the non-renewal of the fixed term contract by the fact that the employee who was appointed as a spotter pilot, had flown an aircraft without a valid licence and on another occasion arrived late to work. The Industrial Court rejected these reasons since the employee had already been disciplined for flying without a license. It was opined that if arriving late to work once was so serious, the employer would have taken immediate disciplinary action. It was accordingly held that an unfair dismissal had occurred.¹⁰⁶⁴

If a fixed term employee was found guilty of misconduct and dismissed for this reason, the correct disciplinary procedure must have been followed prior to the dismissal, particularly if the fixed term contract was renewable. However, if the employee committed misconduct and this was the reason for not renewing his or her contract, the serious nature of his or her transgression could be viewed as a factor mitigating against the creation of a reasonable expectation of continuance of employment, which would mean that the enquiry into the fairness of the dismissal would not mature to this stage.¹⁰⁶⁵

¹⁰⁶⁰ A breakdown in the employment relationship which may be due to the employee's misconduct may mean that the enquiry will not continue up to this point. See the discussion under 2.3.7 in Ch 3.

¹⁰⁶¹ Item 4(1) and (4) of the Code of Good Practice: Dismissal.

¹⁰⁶² *Makongoza and Honeyfields Wholesalers* (2011) 32 ILJ 1462 (CCMA) at paras 13 & 15.

¹⁰⁶³ *Zank v Natal Fire Protection Association* [1995] 16 BLLR 110 (IC).

¹⁰⁶⁴ *Zank v Natal Fire Protection Association* at 116J – 117B.

¹⁰⁶⁵ See the discussion under 3.2.3.7 in Ch 3.

3.4.2.2 Reasons related to the fixed term employee's incapacity

If a fixed term employee is incapable of performing his or her services according to the employer's standards, it would constitute a fair reason for dismissal.¹⁰⁶⁶ Incompetence and incompatibility are fair reasons for the dismissal of a fixed term employee. Nevertheless, a fair procedure must be followed.¹⁰⁶⁷

If the ground for dismissal relates to incapacity or poor work performance the obligation to provide reasons for the dismissal is not expressly stated in the Code of Good Practice: Dismissal. An employer would still be required to comply with the prescribed procedural requirements. The fixed term employee must be informed of his or her shortcomings and interventions such as support, assistance and training should be implemented to attempt to remedy the problem before he or she is dismissed. The employee must also be provided with a reasonable period of time in which he or she may attempt to improve.¹⁰⁶⁸

In the absence of an obvious deterioration in a fixed term employee's performance, poor work performance or problems related to his or her capacity would not be a good reason for not renewing a fixed term contract. This will be the case particularly if there has been continual renewal for a significant period of time. If an employee had been appointed for an extended period it is unlikely that an employer would be in a position to successfully prove that the fixed term employee could not do his or her work.

3.4.2.3 Fair operational reasons

At common law, fixed term employees have the assurance that their employment will not be terminated prematurely for any reason without such a termination constituting a breach of contract.¹⁰⁶⁹ But, the legislation provides that an employer's operational

¹⁰⁶⁶ Item 8(2) of the Code of Good Practice: Dismissal.

¹⁰⁶⁷ *Venter v Renown Food Products* (1989) ICD (1) 611 at 612.

¹⁰⁶⁸ Items 8(2)(b) and 9(b)(ii) of the Code of Good Practice: Dismissal determines that before dismissal will work performance can be effective a reasonable time must be provided in which the employee is allowed to improve. The employee must be afforded a reasonable opportunity. What is reasonable is determined on a case to case basis. See for instance *JGD Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* [1999] ZALAC 40 at para 55.

¹⁰⁶⁹ *Buthlezi v Municipal Demarcation Board* at paras 5, 7, 9, 14 & 16.

reasons constitute a fair reason to dismiss an employee.¹⁰⁷⁰ Failure to renew a fixed term contract could relate to the restructuring of the business, because the project for which the fixed term employee had been appointed has been completed or the employer can no longer afford to employ the fixed term employee.¹⁰⁷¹

Consultation before a retrenchment is mandatory.¹⁰⁷² The aim of the consultation should be to attempt to reach consensus on appropriate measures to avoid or minimise dismissals, change the timing of dismissals or mitigate their adverse effects, the method for selecting employees to be dismissed and severance pay for dismissed employees.¹⁰⁷³ An affected employee should be permitted to make representations which the employer must consider and respond to.¹⁰⁷⁴ The LRA does not provide a list of selection criteria that should be applied. The LRA only requires that selection criteria should be fair and objective.¹⁰⁷⁵

*Nkopane & others v IEC*¹⁰⁷⁶ dealt with the early termination of fixed term contracts and in particular the question whether or not an employer can retrench fixed term employees. In this case the fixed term employees claimed to have been unfairly dismissed for operational reasons. They argued that their dismissals had been both substantively and procedurally unfair. Their case was that an employer is prohibited from prematurely terminating fixed term appointments. In addition they alleged that the employer failed to follow a proper consultation process for retrenchment. The court was required to ascertain whether or not the contracts concluded between the parties in actual fact qualified as fixed term contracts. Kennedy AJ answered this question in the affirmative despite the fact that the wording was vague and unclear. The court confirmed that in the absence of a material breach, it was impossible to terminate fixed term contracts before their termination dates. Premature termination entitles fixed term employees either to claim damages based on a breach of contract or to the protection against unfair dismissal as contained in the LRA. Because the employer had no lawful basis to terminate the fixed term contracts prematurely, the LC held that an unfair

¹⁰⁷⁰ Section 188(1)(a) of the LRA.

¹⁰⁷¹ Section 213 of the LRA defines 'operational requirements' as 'requirements based on the economic, technological, structural or similar needs of an employer'.

¹⁰⁷² Section 189(1) of the LRA.

¹⁰⁷³ Section 189(2) of the LRA. *Banks & another v Coca-Cola SA - A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC) at 2755 - 2756.

¹⁰⁷⁴ Section 189(2), (3), (5) and (6) of the LRA.

¹⁰⁷⁵ Section 189 of the LRA.

dismissal had occurred. In the court's view, the consultation process followed by the employer was comprehensive and the dismissals were therefore held not to have been procedurally unfair.¹⁰⁷⁷

If the employer fails to justify the dismissal by proving substantive and/ or procedural fairness of the dismissal, its conduct would constitute an unfair dismissal. What would constitute a procedurally fair dismissal is a question of fact to be determined by considering the specific circumstances surrounding the dismissal.¹⁰⁷⁸

3.5 Remedies for unfair dismissal in terms of the LRA

A finding that a dismissal was unfair triggers the remedies provided for in ss 193 and 194 of the LRA. What remedy is afforded is within the presiding officer's discretion. This is discussed further below.

3.5.1 Re-instatement or re-appointment

If a dismissal is found to be unfair, the employer may be ordered to re-instate or re-appoint the fixed term employee.¹⁰⁷⁹ The presiding officer must order that the employer re-instate or re-employ the employee. The exceptions to this rule are instances where the employee does not wish to be re-instated or re-employed or the circumstances surrounding the dismissal have rendered the employment relationship intolerable. Re-instatement will also not be ordered if it is not practical for the employer to take the employee back into service or if the dismissal was unfair only because the employer did not follow a fair procedure.¹⁰⁸⁰ Re-instatement is clearly the primary remedy in unfair dismissal cases.¹⁰⁸¹

¹⁰⁷⁶ *Nkopane & others v IEC* (2007) 28 ILJ 670 (LC).

¹⁰⁷⁷ *Nkopane & others v IEC* at paras 75 & 77.

¹⁰⁷⁸ *Swanepoel v Western Region District Council & another* (1998) 19 ILJ 1418 at 1424.

¹⁰⁷⁹ Section 193(1) of the LRA. See also Grogan *Workplace Law* (2009) at 174.

¹⁰⁸⁰ Section 193(2) of the LRA. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at paras 33 - 34.

¹⁰⁸¹ Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' at 19. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 31.

Compensation should only be awarded instead of re-instatement when one of the identified exceptions applies.¹⁰⁸² However, re-instatement is very rarely ordered in disputes concerning unfair dismissal.¹⁰⁸³ In addition, it has been held that re-instatement or re-employment cannot be ordered for a period exceeding the term of the original fixed term contract that had been concluded with the fixed term employee.¹⁰⁸⁴ It has been held that the CCMA would be going beyond the powers conferred to it if re-instatement or re-appointment of a fixed term employee is ordered in excess of the time period of the original fixed term contract which had been agreed upon between the employer and the employee.¹⁰⁸⁵

Employers often appoint other employees in the position the aggrieved employee had filled. By and large the working relationship would have deteriorated to such a degree that it would not be advisable to re-instate or re-appoint the employee in the workplace.¹⁰⁸⁶

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*¹⁰⁸⁷ an unfair dismissal dispute had run the course of seven years without resolve. The court held that something is wrong if a legal system allows for such delays in the resolution of a labour disputes that have the effect that the remedies provided in law become negated. The fact that the main remedy for unfair dismissal becomes unavailable detracts from the legitimacy of the LRA as a protection mechanism.¹⁰⁸⁸

If the judge or arbitrator orders re-instatement, the fixed term employee would return to the position he or she had filled prior to the termination of the contract of employment.

¹⁰⁸² *Mzoku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 ILJ 1575 (LAC) at paras 77 - 79.

¹⁰⁸³ The Tokiso Report indicates that only about 36% of successful applicants are re-instated into their previous positions. Friedman S, Levy A, Mischke C & Venter T *Tokiso Dispute Settlement 2010 Review 2009 – 2010* (2010) at 47. See for instance *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 IC at 325 and *Mbambo NO & others* [2005] 1 BLLR 71 (LC) at para 29. See also *Nathan v the Reclamation Group (Pty) Ltd* (2002) ILJ 588 (CCMA) at 601C – D.

¹⁰⁸⁴ *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] 10 BLLR 1105 (LC). See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 33.

¹⁰⁸⁵ *Cash Paymaster Services Northwest (Pty) Ltd v CCMA & others* (2009) 30 ILJ 1587 (LC) at para 24.

¹⁰⁸⁶ Friedman S, Levy A, Mischke C & Venter T *Tokiso Dispute Settlement 2010 Review 2009 – 2010* (2010) at 47.

¹⁰⁸⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

¹⁰⁸⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* at para 44. See also Vettori Stella 'Enforcement of Labour Arbitration Awards in South Africa' (2013) 25 *SA Merc LJ* 245 in which the author discusses the shortcomings of the labour dispute resolution system provided for in the LRA.

The presiding officer may also under this provision order the employer to re-employ¹⁰⁸⁹ the fixed term employee, either in the work in which he or she used to be in or *in other reasonably suitable work*. There is no reference made in the legislation as to what would constitute other reasonably suitable work. The section provides that the re-employment can be *on any terms*. The presiding officer has discretion to afford the employee an appointment to a position which is considered to be reasonable under the given circumstances.

It could be work on a lower level (a demotion) or even on a higher level since the order to re-employment may be made on any terms. It is inferred that s 193(1)(b) of the LRA attempts to provide for a situation where, due to the unavailability of the employee's previous position¹⁰⁹⁰ he or she would have to be placed in some other position in the workplace. It could also be that the presiding officer has discretion in this regard to afford the employee an appointment to a position which is found to be reasonable under the given circumstances. If this should be the case, an employee who has proven a legitimate expectation of indefinite appointment, could be appointed in accordance to what he or she had expected, i.e. permanently. This would support the aim of s 186(1)(b) of the LRA to prevent the situation where a temporary employment contract is continuously renewed without affording the employee the benefits attached to a permanent appointment.

What is clear from the discussion above is that there is no certainty as to what award the arbitrator will make. There are no prescribed guidelines as to the factors that would render continued employment intolerable. The judge or arbitrator must determine this with regard to what is reasonable in the circumstances. Likewise, what is practical or otherwise would also depend on what is reasonable in the presiding officer's view in the particular circumstances. This discretion regarding which remedy to award is subject to the principles of fairness and reasonableness.¹⁰⁹¹ Presiding officers have been known

¹⁰⁸⁹ Section 193(1)(a) of the LRA. Re-employment implies the creation of a new employment relationship which may not be on the same terms as a previous engagement. See *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) at para 37.

¹⁰⁹⁰ This should however not apply as a rule. Unless there are special circumstances, the main remedy should be used. See *FGWU & others v Letabakop Farms (Pty) Ltd* [1996] BLLR 23 (IC) at 30H. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 31.

¹⁰⁹¹ Vettori Stella *The Employment Contract and the Changed World of Work* (Ashgate Publishers 2007) at 84 – 87.

to apply patently artificial techniques to arrive at a result that they consider fair or to avoid an outcome that they consider to be unfair.¹⁰⁹²

3.5.2 Compensation

In terms of the common law an employee would only be entitled to claim compensation in the amount in lieu of the notice that he or she is lawfully entitled to. In other words, employees would usually be restricted to a claim of one month's remuneration as compensation. For fixed term employees the position is different. Since fixed term employees are guaranteed job security for the full term of the contract, a fixed term employee whose fixed term contract was terminated prematurely would in principle be entitled to an amount of compensation equal to that which he or she would have received had the contract run its full course.¹⁰⁹³ However, it has been decided that the amount of compensation need not necessarily be limited to what the fixed term employee would have received had he or she been permitted to complete the term of the appointment.¹⁰⁹⁴

Ordinarily the compensation amount for an unfair dismissal is limited to a maximum of twelve months' salary.¹⁰⁹⁵ In circumstances where a dismissal is automatically unfair¹⁰⁹⁶

¹⁰⁹² Robertson Andrew 'The Limits of Voluntariness in Contract' *Melbourne University Law Review* Vol. 29 (2005) 179 at 205 - 206.

¹⁰⁹³ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 at para 38.

¹⁰⁹⁴ *Victor & another and Picardi Rebel* (2005) 26 ILJ 2469 (CCMA) at paras 26 - 33. See also *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847(LAC) at para 38.

¹⁰⁹⁵ Section 194(2) of the LRA.

¹⁰⁹⁶ In terms of s 187 of the LRA a dismissal is automatically unfair if the reason for dismissal is one or more of the following: the employee joined a trade union; the employee exercised a right in terms of the LRA; the employee disclosed protected information; the employee participated in a protected strike, protest action or refused to work during a protected strike or lock-out; to compel an employee to accept a demand in a matter of mutual interest; the employee took action against the employer which he was entitled to take; the pregnancy of the employee or related reasons; discrimination by the employer against the employee; a transfer contemplated in terms of s 197/197 A. Although HIV is not listed in s 187, the Code of Good Practice: Key Aspects of HIV/AIDS and Employment at para 5.3.4 refers to s 187 when it declares that an employee may not be dismissed simply because he or she is HIV positive. See *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at para 32 with regard to the approach followed by the courts in the application of s 187(1)(a) of the LRA (discrimination for joining a trade union). See *Jabari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (LC) at 1869 where an employee was held to have been unfairly dismissed in terms of s 187(1)(d) since the dominant reason for the dismissal was the fact that the employee had referred an unfair labour practice dispute. See *Solidarity obo McCabe v SA Institute for Medical Research* [2003] 9 BLLR 927 (LC), *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at para 27 and *Nieuwoudt v All-Pak* (2009) 30 ILJ 2444 (LC) at 2460 regarding an application of s 187(1)(e) (discrimination based on pregnancy). See also generally *Tshishonga*

an award cannot exceed 24 months' remuneration as compensation¹⁰⁹⁷ unless the court determines exceeding such an amount would be reasonable and fair in the circumstances.¹⁰⁹⁸ It has been held that the cap that is placed on the amount of compensation which is claimable is aimed at balancing the competing interests of employers and employees.¹⁰⁹⁹ However, in my view the limitation does not properly take the diminutive bargaining position of fixed term employees into consideration.

In terms of the LRA, the amount of compensation to be awarded is open to judicial discretion.¹¹⁰⁰ It is important to consider the object of compensation.¹¹⁰¹ In *Ferodo (Pty) Ltd v De Ruiter*,¹¹⁰² it was the courts view that the correct approach in determining how much compensation should be awarded is to be found in the English law. According to the court, the basic principle should be that an unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him or her. Monetary compensation is considered as a solatium for employees who have been subjected to unfair procedures in dismissal.¹¹⁰³

In England, as long as a reasonable amount of notice is provided to an employee before the termination of his or her employment or payment is made in lieu of notice, it is impossible to claim based on unlawful dismissal. In instances where a claim is permitted, the amount of compensation that may be ordered by the employment tribunal is limited. A fixed term employee would only be able to claim compensation in respect of the time which the court considers to be a reasonable period of notice in the particular circumstances and the time which is considered reasonable for an employer to have

v Minister of Justice and Constitutional Development & another [2007] 4 BLLR 327 (LC) at paras 86 & 95 *et seq* and *Pedzinski v Andisa Security (Pty) Limited* [2006] 2 BLLR 184 (LC) at paras 28 – 35 for an application in terms of s 187(1)(h) (dismissal for making a protected disclosure).

¹⁰⁹⁷ Section 194(3) of the LRA. See also *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at 420F.

¹⁰⁹⁸ Section 194(4) of the LRA. See also *Wallace v Du Toit* (2006) 27 ILJ 1754 (LC) at para 20.

¹⁰⁹⁹ *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) at para 100.

¹¹⁰⁰ *Fouldien & others v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259 (LC) at para 16.

¹¹⁰¹ In *Camdons Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 (LAC) at 1018 the term 'compensation' was been held to mean 'to make amends for a wrong that has been inflicted. Compensation is closer to what is understood under a delictual claim than a contractual one. See *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 655 (LAC) at 661.

¹¹⁰² *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) at 981C - G.

¹¹⁰³ *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) at para 41. See also *Minister of Justice and Constitutional Development & another v Tshishonga* (2009) 30 ILJ 1799 (LAC) at 1808 – 1809. Davis JA determined that the court is guided by jurisprudence relating to the award of solatium in terms of the *actio injuriarum*. Factors considered in determining the amount of compensation which would be just and equitable include the degree of humiliation and indignity suffered by the employee. The amount of the award ultimately falls within the discretion of the court.

followed the correct procedure in termination of the employment.¹¹⁰⁴ If a fixed term contract is cancelled prematurely, the losses flowing from the premature termination is claimable. This would include the fixed term employee's salary for the remainder of the contract and any benefits that he or she had been entitled to or promised by the employer, subject to the principle of mitigation.¹¹⁰⁵

The LRA does not limit compensation only to pecuniary loss. In some cases emotional distress suffered or sentimental damages have been awarded by the Labour Court as solatium in terms of the compensation provision.¹¹⁰⁶ In terms of the LRA compensation must be determined on terms that are just and equitable in the circumstances subject to the limitations.¹¹⁰⁷ In determining the amount of compensation, all relevant factors must be considered, including the conduct of the employer and the employee respectively. Although the purpose of compensation is more often compensatory in nature, there have been decisions in which it seems to also have played a punitive role.¹¹⁰⁸ This would ordinarily be the case if the employer's conduct impacted negatively on the employee's dignity.¹¹⁰⁹ If compensation as remedy has a punitive function, whether or not an employee had since the unfair dismissal been able to secure alternative employment, would be irrelevant.¹¹¹⁰

The presiding officer in determining what remedy is appropriate as well as in deciding on the amount of compensation has discretion subject to the principles of fairness and reasonableness and the prescribed limits on compensation.¹¹¹¹ Ultimately the outcome in any particular case is dependent on the interpretation of what is fair and reasonable.¹¹¹²

¹¹⁰⁴ *Addis v Gramophone Co Ltd* [1909] AC 488. *Dietman v London Borough of Brent* [1987] IRLR 167. See also *Boyo v London Borough of Lambeth* [1995] IRLR 50.

¹¹⁰⁵ Lewis & Sargeant with Schwab *Employment Law: The Essentials* 11th edn (HR-Inform 2010) at 446 – 447.

¹¹⁰⁶ See for instance *Nieuwenhuis v Group Five Roads & others* (2000) 21 ILJ 2074 (LC) at paras 90 & 98 and *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) at paras 46 & 51.

¹¹⁰⁷ *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 33 ILJ 2847 (LAC) at para 31.

¹¹⁰⁸ See for instance *Chemical Energy Paper Printing Wood & Allied Workers Union & another v Glass & Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC) at para 49.

¹¹⁰⁹ Vettori S 'The role of human dignity in the assessment of fair compensation for unfair dismissals' [2012] Vol. 15 No. 4 *PER* 102 at 110 – 111.

¹¹¹⁰ *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at paras 69 - 72.

¹¹¹¹ *Kylie v CCMA & others* (LAC) at para 52 Davies AJ discusses the considerable discretion that presiding officers enjoy.

¹¹¹² Dimatteo 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment', *South Carolina Law Review* Vol. 48 (1997) 294 at 343 - 353 provides an explanation for the reasoning that presiding officers' subjective opinions play a role in the application of the reasonable man

In *NUM v East Rand Gold & Uranium Co Ltd*¹¹¹³ Goldstone JA remarked that the court should, in the exercise of its powers and discretion, not only consider the contractual or legal relationship between the parties in a labour dispute. It should also evaluate what would be fair in the circumstances. In determining the amount of compensation that should be ordered various factors should be taken into account. These factors include, the reason for the dismissal, whether the dismissal was substantively or procedurally unfair or both, the degree of deviation from the prescribed procedural requirement if any, the consequences to the parties and their conduct in relation to the LRA and the effective resolution of the dispute.¹¹¹⁴

In *Lakomski v TTS Tool Tecnic Systems (Pty) Ltd*¹¹¹⁵ the court held that even if an employee suffered no financial harm, compensation may still be awarded. The test is whether it is just and equitable in the particular circumstances to grant compensation. Patrimonial loss remains relevant to the enquiry, but does not conclusively answer the question regarding the appropriateness of compensation as remedy.

In *Fouldien v House of Trucks (Pty) Ltd*¹¹¹⁶ Landman J pointed out that determining the quantum of compensation in this way is 'a new general discretion which does not give priority to a solatium for procedural unfairness.'¹¹¹⁷ In *Pretoria Society for the Care of the Retarded v Loots*¹¹¹⁸ Nicholson JA considered what factors should be taken into account when determining the amount of a compensation award.¹¹¹⁹ Factors to be considered in determining the amount of compensation include the actual financial loss suffered; the causality between the loss suffered and the conduct complained about.¹¹²⁰ The aim should be to place the applicant in the position he or she would have been in had the unfair act not taken place; the award should not be a punitive measure. In addition an employee seeking compensation is obliged to mitigate the damage suffered

test. See also Vettori Stella 'Fixed term contracts: The permanence of the temporary' *Stell LR* (2008) Vol. 2 189 at 207.

¹¹¹³ *NUM v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) 1237G - H.

¹¹¹⁴ *Dr DC Kemp t/a Centralmed v Rawlins* [2009] 11 BLLR 1027 (LAC) at paras 20 – 22.

¹¹¹⁵ *Lakomski v TTS Tool Tecnic Systems (Pty) Ltd* (2007) 28 ILJ 2775 (LC) at paras 40 - 42.

¹¹¹⁶ *Fouldien v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259 (LC) at 2264.

¹¹¹⁷ See *National Industrial Workers Union & others v Chester Wholesale Meats KZN (Pty) Ltd* (2004) 25 ILJ 1293 (LC). See also Cohen Tamara 'Exercising a Judicial Discretion - Awarding Compensation for Unfair Dismissals' (2003) 24 *Industrial Law Journal* 737 for further information on compensatory awards.

¹¹¹⁸ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 989 - 991.

¹¹¹⁹ The factors mentioned by Combrinck J in *Ferodo (Pty) Ltd v De Ruite* (1993) 14 ILJ 974 (LAC) at 981C - G were cited.

¹¹²⁰ The loss should have been a consequence of in this case, the unfair labour practice. In addition, the effect should not be so far removed from the reason therefore that it could not have reasonably been unforeseen.

by taking all reasonable steps to acquire alternative employment; any benefit that had been received by the fixed term employee must be taken into consideration.

If a fixed term employee applies for appointment to a specific post, it could be reasonably expected that the employer follows a fair selection procedure. A fixed term employee would not be able to claim that he or she had lost benefits attached to such a position due to the fact that the employer did not follow the correct procedure. If there is discrimination during the selection process or the appointment, the aggrieved applicant could base a claim on legitimate expectation.¹¹²¹ But, in the absence of discrimination or victimisation during the selection process or the appointment, he or she cannot base a claim on a subjective expectation that he or she is the most suitable candidate for appointment.¹¹²² An employee who is appointed temporarily cannot claim an expectation of permanent employment and the benefits attached to being indefinitely appointed in terms of s 186(1)(b) of the LRA.¹¹²³

The remedy offered by s 186(1)(b) lacks substance due to the resistance by our courts to accept the notion of substantive legitimate expectation. The decision in *University of Pretoria v CCMA & others*¹¹²⁴ unequivocally confirms that the inclusion of the doctrine of legitimate expectation into labour legislation does not include any genuine expectation of a substantive benefit or relief. All that can possibly be claimed in terms of s 186(1)(b) of the LRA is a 'renewal' of the rights which already existed at time of termination of the contract of employment. The only certainty a fixed term employee has regarding the outcome of a dispute referred in terms of s 186(1)(b) of the LRA is the possible maximum award that the commissioner may make.¹¹²⁵

¹¹²¹ *Spoornet (Joubert Park) v Salstaff (Johannesburg)* [1998] 4 BALR 513 (IMSSA) at 515.

¹¹²² *Swanepoel v Western Region District Council & another* (1998) 19 ILJ 1418 at 1423 – 1424.

¹¹²³ In *Crawford v Grace Hotel* [2002] 5 LLD 581 (CCMA) it was held that an employee on probation is not justified in holding expectations of permanent appointment upon completion of the probationary period. Nor does an employee who is employed on a temporary basis have a legitimate expectation of permanent appointment until a post can be permanently filled. In *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at 1246H - 48F it was held that 'an entitlement to permanent employment cannot be based simply on the reasonable expectation of s 186(1)(b).' A fixed term employee having a reasonable expectation of permanent appointment would in the current context of interpretation of legitimate expectation by our courts, have to prove that the right to permanent appointment in fact already existed and that the employer was taking away this existing right by not appointing him or her permanently.

¹¹²⁴ *University of Pretoria v CCMA & others* [2011] ZALAC 25.

¹¹²⁵ Vettori 'Fixed Term Contracts: The Permanence of the Temporary' Stell LR 2008 Vol. 2 198 at 205 – 206.

The maximum amount of compensation is rarely afforded in case of an unfair dismissal. The average compensation award for an unfair dismissal which is found to be both substantively and procedurally unfair is six months' remuneration.¹¹²⁶

Even the maximum awards would in many cases not adequately compensate the fixed employee. Fixed term employees are denied benefits for the full duration of their contracts and future rights that they would have had after termination had they been permanently appointed. Considering the fact that fixed term employees could in terms of the common law in principle claim an unlimited amount, the statutory remedy does not provide sufficient protection to fixed term employees.¹¹²⁷

3.5.2.1 Severance payment as part of compensation for unfair dismissal

If a fixed term employee is dismissed for operational reasons, the employer is expected to consult with him or her and if possible, to offer the employee alternative employment.¹¹²⁸ If a fixed term contract is terminated due to the employer's operational requirements, the fixed term employee will be entitled to severance pay. The amount of this payment depends on the employee's length of service.¹¹²⁹

Although the basic rights in the BCEA are legislated and would enjoy preference over less beneficial or in the absence of stipulation in a fixed term contract,¹¹³⁰ employers often do not comply with the legislation. Supremacy of contractual terms over equity permits employers to get away with not giving fixed term employees what they are legally entitled to. Signing a fixed term contract is also often viewed as a waiver of the right to claim severance pay. The courts also do not seem to enforce the statutory right to severance pay in as far as fixed term employees are concerned.¹¹³¹

¹¹²⁶ In 2009/2010, the average arbitration compensation amount was R49 168.79. This amount increased slightly to R50 587.97 for the first few months of 2011. Compensation amounts are usually much less than the maximum claim amount for claims that are entertained by the Magistrate's Court. Friedman S, Levy A, Mischke C & Venter T *Tokiso Dispute Settlement. 2010 Review 2009 – 2010* (Juta and Co: Cape Town 2010) at 47. See also the RIA of 2010 at 108.

¹¹²⁷ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1037.

¹¹²⁸ Section 189 of the LRA read with s 41(4) of the BCEA.

¹¹²⁹ Section 41 of the BCEA.

¹¹³⁰ Sections 4 & 5 of the BCEA. See also *De Beer v SA Export Connection CC t/a Global Paws* (2008) 29 ILJ 347 (LC) at paras 20 – 21 for an example of the application of this principle.

¹¹³¹ See generally *Chiloane & others v Rema Tip Top Industries (Pty) Ltd* [2002] 11 BLLR 1066 (LC). Although this case did not entail fixed term employees, the court accepted that the employees *in casu* had waived their right to severance pay by agreement. Since fixed term employees agree to a termination date or

In *Nkopane & others v IEC*¹¹³² Kennedy AJ held that any severance payment that the fixed term employee had received should be subtracted from the compensation award amount.¹¹³³ This does not seem to be what the Legislature intended. The LRA expressly states that a compensation award which is made to an employee is *in addition*¹¹³⁴ to any other amount which he or she may be entitled to in law or by virtue of an individual or collective agreement.¹¹³⁵

In *Bronn v University of Cape Town*¹¹³⁶ the court held that severance pay was intended as a means of providing social security to employees whose services are terminated due to no fault of their own. If this is the case, or if severance pay is payable to employees in recognition of their long service,¹¹³⁷ it would seem unjust to deny fixed term employees who are unfairly retrenched an additional severance payment. As the reason for termination of a fixed term employee's employment is arguably always related to the employer's operational requirements, fixed term employees should be entitled to such a payment in addition to any award of compensation they may receive because their services were unfairly terminated.

Concluding Remarks

Fixed term employees, particularly those hoping that their contracts will be renewed or made permanent, may be disinclined to institute legal proceedings against their

termination upon the happening of a specific event, the same principle should be applicable to them, i.e. there would be no dismissal making them eligible to claim severance pay. See also *Khumalo v Supercare Cleaning* [2000] 8 BALR 892 (CCMA) at 897D - F. See further *SACCAWU obo Makubalo & Others v Pro-Cut Fruit & Veg* [2002] 5 BALR 543 (CCMA) at 545E where it was confirmed that fixed term employees are not entitled to additional severance pay like permanent employees.

¹¹³² *Nkopane & others v IEC* (2007) 28 ILJ 670 (LC).

¹¹³³ *Nkopane & others v IEC* at para 80.

¹¹³⁴ My accentuation.

¹¹³⁵ Section 195 of the LRA.

¹¹³⁶ *Bronn v University of Cape Town* (1999) 20 ILJ 951 (CCMA) at 952H - J.

¹¹³⁷ Although this seems to be the position in England, South African labour courts have not conclusively recognised the rationale for the payment of severance pay in as far as fixed term employees are concerned. In *Lloyd v Brassey* [1969] 1 All ER 382 at 383 Lord Denning stated: 'A worker of long standing is now recognised as having an accrued right in his job; and his right gains in value with the years. So much that if the job is shut down, he is entitled to compensation for loss of the job - just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat 'not'. Even if he gets a job straight away, he nevertheless is entitled to full redundancy payment. It is, in a real sense, compensation for long service.' There have been cases in the South African industrial court which cited this finding with approval. See for instance *Jacob v Prebuilt Products (Pty) Ltd* (1988) 9 ILJ 1100 (IC) at 1104E - H. See also *TGWU v Action Machine Moving and Warehousing (Pty) Ltd* (1992) 13 ILJ 646 (IC) at 649 - 53 in which the two different schools of thought regarding the purpose of severance pay is discussed.

employers in the course of employment.¹¹³⁸ The unfair labour practice definition does not assist a fixed term employee in a dismissal claim.¹¹³⁹ 'Renewal' of a fixed term contract in terms of s 186(1)(b) of the LRA would not constitute a promotion.¹¹⁴⁰ A fixed term employee, who works in a higher position temporarily and is then returned to his or her previous position, also will not succeed in a claim based on unfair demotion.¹¹⁴¹ The provision of benefits to employees is discretionary. It is not a legislated right. What qualifies as 'benefits' has not been made very clear. Since fixed term employees often rely upon reasonable expectation it may be very difficult for them to prove a legal entitlement to benefits.¹¹⁴²

Fixed term employees do not have immediate access to protection against unfair dismissal.¹¹⁴³ The onus of proof to prove that a dismissal had occurred usually rests on the fixed term employee.¹¹⁴⁴ The existence of a substantive expectation of renewal of a fixed term contract is insufficient. It must be proven that such an expectation was reasonable.¹¹⁴⁵ The courts have laid down factors that are required in order to establish whether or not an expectation of continuance of employment is reasonable in the circumstances. Nevertheless, this assessment requires consideration of all the surrounding circumstances.¹¹⁴⁶

Even if a fixed term employee is capable of proving that he or she had a reasonable expectation that his or her employment would continue, it does not mean that an unfair dismissal occurred.¹¹⁴⁷ It is possible for an employer to raise various defences and escape liability.¹¹⁴⁸

¹¹³⁸ See the discussion under 3.1 above.

¹¹³⁹ This is discussed under 3.1.1 – 3.1.3.

¹¹⁴⁰ See the discussion under 3.1.1 above.

¹¹⁴¹ This is discussed under 3.1.3.

¹¹⁴² See the discussion under 3.1.2 above.

¹¹⁴³ Section 186(1)(b) of the LRA which is made applicable to fixed term employees set certain qualifications.

¹¹⁴⁴ This is as a result of the application of s 191 of the LRA. See the discussion under 3.2.1.

¹¹⁴⁵ This is discussed under 3.2.1 – 3.2.3.

¹¹⁴⁶ See the discussion under 3.2.3.

¹¹⁴⁷ Upon the plain wording of s 186(1)(b) of the LRA it would only constitute a dismissal and not an unfair dismissal.

¹¹⁴⁸ See the discussion under 3.4.

The Code of Good Practice: Dismissal does not specifically deal with termination of fixed term employment contracts. No guidelines are provided regarding the procedure that employers should follow prior to dismissal.¹¹⁴⁹

There is no legislative provision requiring employers to provide reasons for the initial appointment of workers on fixed term contracts or for subsequent renewal of fixed term employment contracts.¹¹⁵⁰ Employers are also not required to provide fixed term employees with reasons for termination of their employment. In terms of the common law fixed term employees terminate automatically. Consequently no fair reason has to exist for the termination of these contracts and no special procedure needs to be followed by employers.¹¹⁵¹

Fixed term employees cannot be sure of anything when referring an unfair dismissal dispute. There is no guaranteed basic compensation award that they will definitely receive. What remedy is provided to them, if any, is left completely within the presiding officer's discretion. The LRA makes no effort to preserve employment and socio-economic circumstances are ignored during the determination of what remedy is appropriate.

Re-instatement as main remedy is rarely available. Fixed term employees have an even slighter chance of being re-appointed, because a subsequent appointment will usually not exceed the original term for which the fixed term contract had been concluded. Usually the working relationship would have deteriorated or the employer would have appointed someone else. This detracts from the legitimacy of the LRA as means of ensuring access to social justice.

Section 194 of the LRA limits the amount of compensation that is claimable for unfair dismissal. This restriction does not take account of the fact that fixed term employees are denied benefits that indefinitely appointed employees receive in the course of employment, including medical aid benefits and pension benefits. In general, compensation awards are also much lower than the statutory maximum. These awards often do not compensate fixed term employees adequately.¹¹⁵²

¹¹⁴⁹ See the discussion under 3.4.2.

¹¹⁵⁰ See the discussion under 3.2.3.4.

¹¹⁵¹ See the discussions under 3.4.2.1 – 3.4.2.3.

¹¹⁵² See the discussion under 3.5.2.

In the next chapter the dispute resolution process is scrutinised in order to identify its shortcomings

Weaknesses in the dispute resolution system

4

Introduction

For the CCMA to have jurisdiction over an unfair dismissal dispute in terms of s 186(1)(b) of the LRA, the dispute must have been referred timeously. In addition in certain instances, a fixed term employee would be required to prove that he or she is an 'employee' for purposes of the application of the legislation. Only then can the tedious process of proving that a reasonable expectation was created begin. At any time during the conciliation or arbitration, a point *in limine* could be raised.

Unfortunately, a ruling made by the commissioner on each of these jurisdictional issues is capable of referral to the Labour Court on review and subsequent appeals. An appeal is also possible against a judgment made in the Labour Court. In order to appeal, any one of the parties must apply for leave to appeal to the Labour Appeal Court.¹¹⁵³ Subject to the Constitution an appeal may be brought against any judgment of the Labour Court which is final and binding. The Labour Appeal Court is the only court which may hear appeals regarding matters which fall within the Labour Court's exclusive jurisdiction.¹¹⁵⁴

In this chapter, some of the technical barriers caused as a result of the institutions provided for dispute resolution in dismissal cases are scrutinised.

4.1 Establishing jurisdiction

For a fixed term employee to refer an unfair dismissal dispute in terms of s 186(1)(b) of the LRA, a number of jurisdictional factors must be complied with. The applicant must

¹¹⁵³ Section 166 of the LRA.

¹¹⁵⁴ Section 166(4) of the LRA.

qualify as an 'employee,' the referral must be done within the stipulated time periods and it must not be premature.¹¹⁵⁵ In addition, the existence of a reasonable expectation of continued employment must be established in order to prove that a dismissal occurred.¹¹⁵⁶ At any time during the proceedings a point *in limine* may be raised regarding one of these issues. These jurisdictional factors that may be raised in unfair dismissal disputes concerning fixed term employees are briefly elaborated upon below.

4.1.1 Referral of the dismissal dispute must not be premature

A dispute regarding an alleged unfair dismissal must be referred within the statutory time frames. The LRA provides that a dismissal dispute must be referred to the CCMA or a bargaining council having jurisdiction within 30 days of the date of dismissal.¹¹⁵⁷ A dispute concerning an alleged unfair dismissal must be referred by the employee within 30 days of the date of dismissal.¹¹⁵⁸ Under certain circumstances an employee would be permitted to refer an unfair dismissal dispute after the 30 days have lapsed. This will only apply if good cause can be shown by the party requesting the extension of the 30 day period.¹¹⁵⁹

A fixed term employee must comply with the time limits set for the referral of a dispute, or bring a successful condonation application. In an application for condonation, he or she will be required to provide acceptable reasons for the delay and also prove that the strength of the case on its merits justifies hearing the matter despite such a delay.¹¹⁶⁰ Failure to comply with these time limits could lead to *in limine* proceedings. A commissioner must deal with such a matter when the jurisdictional point is raised. If a dispute is referred out of time, the applicant would need to apply for condonation simultaneously with the referral of the dispute.¹¹⁶¹ Before a dismissal has occurred a referral based on unfair dismissal would be premature.¹¹⁶²

¹¹⁵⁵ This is discussed below under 4.1.1.

¹¹⁵⁶ Theron Jan 'Employment is Not What It Used to be' (2003) 24 *Industrial Law Journal* 1247 at 1274.

¹¹⁵⁷ Section 191 of the LRA. See also Grogan *Employment Rights* (2010) at 13.

¹¹⁵⁸ Section 191(1) of the LRA.

¹¹⁵⁹ Section 191(2) of the LRA.

¹¹⁶⁰ See for instance *Van der Grijp v City of Johannesburg* (2007) 28 ILJ 2079 (LC) at 2079.

¹¹⁶¹ Rule 9(2) of the CCMA Rules. A detailed description of the reason for the late referral must be provided. For a recent case dealing with condonation for a late referral of a dismissal dispute see *Toko and City of Cape Town* [2013] JOL 30175 (SALGBC).

¹¹⁶² *Avgold-Target Division v CCMA & others* (2010) 31 ILJ 924 (LC).

The case of *Avgold-Target Division v CCMA & others*¹¹⁶³ illustrates the technicalities related to jurisdiction of the CCMA well. In this matter, a fixed term employee's main argument was that he had in actual fact been permanently employed despite the express wording of the contracts that he had signed voluntarily. In the alternative he claimed that the fixed term appointments were used as a type of probation. The fixed term employee, an admitted attorney, acknowledged that he had been aware of the fact that he had signed a fixed term contract. Despite this, he argued that it was never suggested that his employment was of a temporary nature.¹¹⁶⁴ This notion was strengthened by the fact that the employer had concluded four consecutive fixed term contracts with him.¹¹⁶⁵ In his referral to the CCMA the applicant employee averred that he was in fact appointed indefinitely.¹¹⁶⁶ The employee further alleged that he believed the fixed term contract to be a mere formality to ensure payment. He further noted that he was under the impression that his fixed term contract would be renewed until such time as his permanent appointment would be confirmed.¹¹⁶⁷

During conciliation of the dispute a point *in limine* was raised by the employer that the respondent was not an 'employee', but an independent contractor. The CCMA commissioner ruled that the respondent in fact was an 'employee'. A certificate of non-resolution was issued.¹¹⁶⁸ A second point *in limine* was raised during arbitration, namely that the dispute had been referred prematurely. The court was required to consider when the date of dismissal was with reference to the provision pertaining to both permanently appointed employees and fixed term employees.¹¹⁶⁹

The date of dismissal for indefinitely employed employees is the earlier of the date on which the contract of employment terminated or the date on which the employee left the employer's services.¹¹⁷⁰ If the employee was indefinitely appointed he would have stopped working for the employer weeks after the dispute had been referred to the CCMA and the dispute would have been referred prematurely.¹¹⁷¹ This would mean that

¹¹⁶³ *Avgold-Target Division v CCMA & others* at para 38.

¹¹⁶⁴ *Avgold-Target Division v CCMA & others* at para 6.

¹¹⁶⁵ *Avgold-Target Division v CCMA & others* at para 2.

¹¹⁶⁶ *Avgold-Target Division v CCMA & others* at para 19.

¹¹⁶⁷ *Avgold-Target Division v CCMA & others* at para 19.

¹¹⁶⁸ *Avgold-Target Division v CCMA & others* at para 20.

¹¹⁶⁹ *Avgold-Target Division v CCMA & others* at para 28.

¹¹⁷⁰ Section 190(1)(a) and (b) of the LRA.

¹¹⁷¹ *Avgold-Target Division v CCMA & others* at para 34.

the CCMA lacked jurisdiction to conciliate or to arbitrate the dispute. If a fixed term employee's contract is not renewed, the date of dismissal would be the date on which the fixed term employee was informed by the employer of the non-renewal of his or her contract. Therefore, if the employer had not taken a final decision not to renew the contract, a referral of an unfair dismissal dispute would likewise be premature.¹¹⁷²

In terms of s 145 of the LRA, any final award made in arbitration proceedings may be referred to the Labour Court to be reviewed. An application for review has to be brought within a period of six weeks of the date of receipt of the arbitration award.¹¹⁷³ If a referral is done outside of these time limits, a condonation application must be brought.¹¹⁷⁴ To succeed in a condonation application, he or she will be required to provide acceptable reasons for the delay and also prove that the strength of the case on its merits justifies hearing the matter despite such a delay.¹¹⁷⁵ In *Liwambano v Department of Land Affairs & others*¹¹⁷⁶ the matter was referred two weeks late.¹¹⁷⁷ The employee had failed to bring a condonation application. Leppan AJ held that on that basis alone the review application had to be dismissed.¹¹⁷⁸

4.1.2 The 'employee' must have been appointed in terms of a 'fixed term contract'

As mentioned, only persons who fall within the definition of 'employee' in the labour legislation are covered by it.¹¹⁷⁹ Disguising a contract of employment as a commercial contract and the blurring of the barriers between different types of employment relationships have contributed to more interlocutory applications.¹¹⁸⁰ During these *in limine*-applications, the test used to establish whether or not the respondent qualifies as an 'employee' is the same as for indefinitely appointed employees.¹¹⁸¹

¹¹⁷² Section 190(2)(a) of the LRA. See also *Avgold-Target Division v CCMA & others* at paras 30 - 31.

¹¹⁷³ Section 145(1)(a) of the LRA.

¹¹⁷⁴ *Grogan Employment Rights* (2010) at 13.

¹¹⁷⁵ See for instance *Van der Grijp v City of Johannesburg* (2007) 28 ILJ 2079 (LC) at 2079.

¹¹⁷⁶ *Liwambano v Department of Land Affairs & others* [2013] JOL 30216 (LC).

¹¹⁷⁷ *Liwambano v Department of Land Affairs & others* at paras 3 - 4.

¹¹⁷⁸ *Liwambano v Department of Land Affairs & others* at paras 6 - 7.

¹¹⁷⁹ See the discussion under 1 in Ch 1.

¹¹⁸⁰ The ILO comments that the incidence of disputes regarding the nature of the employment relationship is becoming more frequent for this reason. ILO 'Report V: the Scope of Employment Relationships. International Labour Conference, 91st Session Geneva: International Labour Office. See also Benjamin & Gruen 'The Regulatory Efficiency of the CCMA: A Statistical Analysis' at paras 46 - 47.

Employers may attempt to avoid being subject to legislative obligations by disguising the fixed term contract to make a fixed term employee look like an independent contractor. Fixed term contracts may also be concealed as sub-contractor agreements.¹¹⁸² This may be easier than in the case of a permanent employee.

In distinguishing between various legal notions, the court looks at the contract itself in order to determine the intention of the parties when the contract was concluded. The nature of the relationship between the parties must be established primarily from the wording of contract.¹¹⁸³ However, in *Whitehead v Woolworths (Pty) Ltd*¹¹⁸⁴ Waglay AJ held that the mere existence of a contract of employment does not mean that there is an employment relationship. The court stated that an individual is only an 'employee' if he or she actually works for the state or for another person and if he or she is not an independent contractor. Such a person must also be paid or be entitled to be paid.¹¹⁸⁵

This interpretation of s 213 was held to be wrong in *Wyeth SA (Pty) Ltd v Manqele & others*.¹¹⁸⁶ In this case, Nkabinde AJA with Nicholson AJ and Pillay AJA concurring proposed a purposive interpretation aligned with the Constitution.

In *'Kylie' v CCMA & others* a point *in limine* was raised regarding the jurisdiction of the CCMA to entertain an unfair dismissal dispute. The CCMA concluded that it lacked jurisdiction to entertain the dispute, since Kylie's work was illegal in South Africa rendering the contract of employment invalid. The award determined that the CCMA's jurisdiction is conditional upon the existence of a legally enforceable contract. On review, the Labour Court¹¹⁸⁷ agreed with the CCMA commissioner that as a sex worker

¹¹⁸¹ See the discussion of the test used under 1 in Ch 1.

¹¹⁸² Section 14 of the Consumer Protection Act 68 of 2008. The Consumer Protection Act 68 of 2008 may apply in such circumstances. Note that this piece of legislation will not generally apply to fixed term employees since services rendered under an employment contract are expressly excluded. The Consumer Protection Act prohibits unreasonable, unconscionable or oppressive terms in a contract. In addition rights and duties set for suppliers and consumers relating to early termination of the contract may apply. See also Schoeman Nicolene 'Fixed term Contracts' accessed at <http://www.schoemanlaw.co.za/fixed-term-contracts/> (23 August 2012).

¹¹⁸³ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 64B; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 at 683D - E.

¹¹⁸⁴ *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC). It should be noted that this decision was overturned on appeal in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC). This particular aspect was however not reconsidered on appeal.

¹¹⁸⁵ *Whitehead v Woolworths (Pty) Ltd* at 2137A - C.

¹¹⁸⁶ *Wyeth SA (Pty) Ltd v Manqele & others* [2003] 7 BLLR 734 (LC) at para 22. The Labour Courts decision in this regard was confirmed on appeal in *Wyeth SA (Pty) Ltd v Manqele & others* (2005) 26 ILJ 749 (LAC) at para 52.

¹¹⁸⁷ *'Kylie' v CCMA & others* [2008] 9 BLLR 870 (LC) at para 4.

'Kylie' was not entitled to protection against unfair dismissal. However, in the Labour Court as well as in the appeal in the Labour Appeal Court¹¹⁸⁸ it was held that the definition of 'employee' in the LRA¹¹⁸⁹ probably includes someone whose contract of employment is unenforceable at common law. In the appeal it was confirmed that everyone enjoys the right to fair labour practices.¹¹⁹⁰ Therefore, a broader application of s 213 is proposed.

In *Discovery Health v CCMA*¹¹⁹¹ the court was required to assess whether or not the unfair dismissal provisions as contained in the LRA would apply to an Argentine national despite the expiry of his work permit. The employee's representative argued that the employment relationship transcends the contract of employment. Therefore it is possible for an employment relationship to exist despite the fact that no valid contract of employment had been concluded. The Labour Court held that if a contract of employment is not a prerequisite, the validity of the employment contract will not be decisive in determining whether or not a person qualifies as an employee. However, if the statutory definition requires the existence of an employment contract, the validity of the contract of employment becomes important.¹¹⁹²

Section 186(1)(b) of the LRA expressly states that a person who claims protection in terms of the provision should be 'appointed in terms of a fixed term contract.' Therefore, whether or not a reasonable expectation of renewal of a fixed term contract could exist would depend on the existence of a valid contract of employment and its contents.¹¹⁹³ It

¹¹⁸⁸ 'Kylie' v CCMA & others (2010) 31 ILJ 1600 (LAC).

¹¹⁸⁹ This definition is contained in s 213 of the LRA.

¹¹⁹⁰ 'Kylie' v CCMA & others (2010) 31 ILJ 1600 (LAC) at para 22.

¹¹⁹¹ *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) at 1489. See also *Rumbles v Kwa-Bat Marketing* (2003) 24 ILJ 1587 (LC) at paras 17 – 19 which was cited with approval in this case.

¹¹⁹² *Discovery Health v CCMA* at paras 41 & 49.

¹¹⁹³ In *Bayat and Durban Institute of Technology* (2006) 27 ILJ 188 (CCMA) at paras 32 & 35 it was decided that if a contract of employment is subject to a suspensive condition, for instance that a check must first be done before appointment, there can be no legitimate expectation of appointment unless the suspensive condition has been complied with. A person would be hard-pressed to logically contend that he or she realistically expected to be appointed to a position, even though that was conditional on fulfilment of an uncertain future event. See also *IMATU obo Chapman v South Peninsula Municipality* [2000] 5 LLD 424 (CCMA). In this case a municipal employee was interviewed for and recommended for promotion to a senior post. The decision to appoint the employee was flawed since the required quorum was not present at the meeting. After the Committee reconvened they decided in the light of new information which was brought to their attention not to appoint the applicant. It was found that the employee had no legitimate expectation as the decision by the committee was justifiable in relation to the reasons given and a fair procedure was followed in reaching the decision.

therefore seems as if fixed term employees are being treated differently to other employees in as far as access to the dismissal protection is concerned.

Whether or not someone in actual fact qualifies as a fixed term employee must be determined from all the surrounding circumstances. Since the legislation is aimed at protecting job security and since s 23 of the Constitution provides the right to fair labour practices to 'everyone,' this is in my view the correct approach.

In *Denel (Pty) Ltd v Gerber*¹¹⁹⁴ the Labour Appeal Court was required to determine whether Ms Gerber was an employee or an independent contractor. Ms Gerber was the only person rendering services in terms of the agreement. She had normal working hours and was paid a fixed hourly rate. In addition Denel provided her with office space and taxes were deducted from her salary. The BCEA had been incorporated into the agreement and Ms Gerber was expressly subjected to Denel's grievance procedures. Ms Gerber had been paid for her services through a separate company of which she was both a member and a director.¹¹⁹⁵ The court held that effect must be given to the realities of the relationship between the parties.¹¹⁹⁶ Just because there is a contract concluded between two juristic persons it does not mean that the person who owns such a juristic person can never be an 'employee'. Therefore Ms Gerber was found to have been an employee.¹¹⁹⁷

This is well illustrated by *Avgold-Target Division v CCMA & others*.¹¹⁹⁸ In this case Basson J was required to determine whether or not an applicant who was appointed in terms of a fixed term contract was an 'employee.' The final fixed term contract that was signed by the fixed term employee clearly specified the termination date. It also included a provision barring the possibility of a reasonable expectation of continuance of employment beyond that date. The contract expressly stated that the appointee was an independent contractor and that the LRA did not apply. Despite this, reference was made to annual leave and to the fact that 'the employee' was entitled to take leave. The

¹¹⁹⁴ *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

¹¹⁹⁵ *Denel (Pty) Ltd v Gerber* at para 1.

¹¹⁹⁶ *Denel (Pty) Ltd v Gerber* at paras 18 - 21. Regarding the approach of our court to the question of the substance of the arrangements between employers and employees as opposed to legal form, see also *State Information Technology Agency (Pty) Ltd v CCMA* (2008) 29 ILJ 2234 (LAC) at para 10 and *Goldberg v Durban City Council* 1970 (3) SA 325 (N) at 331B - C.

¹¹⁹⁷ *Denel (Pty) Ltd v Gerber* at 1297.

¹¹⁹⁸ *Avgold-Target Division v CCMA & others* (2010) 31 ILJ 924 (LC).

contract also contained a non-variation clause.¹¹⁹⁹ The court concluded that this was indeed an employment relationship.

For s 186(1)(b) of the LRA to apply, the prerequisite is that the employee must have been appointed in terms of a fixed term contract. Therefore, whether or not a claim should be couched in terms of s 186(1)(b) is dependent upon the existence of a fixed term contract. An employee who does not qualify as a fixed term employee would nevertheless be protected in terms of the ordinary dismissal provisions if he or she can prove that an unfair dismissal had occurred.

In *NCAWU obo Mapande v Siyaphambili Adult Education Centre*¹²⁰⁰ the employee failed to sign the last page of a fixed term contract at the commencement of employment. When she went on maternity leave, she was informed that her fixed term contract had terminated. The employer insisted that it had a fixed term contract on file and that only the last page had not been signed by the employee. The commissioner noted that a contract of employment must be concluded at the commencement of the employment relationship. Since the employer had failed to cause a complete fixed term contract to be signed, the employee was not considered to be a fixed term employee. It was held that an ordinary unfair dismissal had occurred and s 186(1)(a) of the LRA was applied.

This case can be distinguished from the recent decision in *Cloud Hamandawana and Dispute Resolution Centre & others*¹²⁰¹ In that matter the fixed term employee refused to sign a fixed term contract, but nevertheless continued working on the terms of the agreement and being paid.¹²⁰² When his services were terminated on the agreed upon date, he alleged that in the absence of a signed fixed term contract, he was indefinitely appointed. The LC held that the employee was appointed in terms of a fixed term contract despite the fact that he had never signed the agreement.¹²⁰³

Despite the fact that certain courts use the 'ordinary' dismissal mechanism of s 186(1)(a) of the LRA in instances where it turns out that the fixed term employee was

¹¹⁹⁹ *Avgold-target Division v CCMA & others* at para 4.

¹²⁰⁰ *NCAWU obo Mapande v Siyaphambili Adult Education Centre* NC1583-06.

¹²⁰¹ *Cloud Hamandawana and Dispute Resolution Centre & others* Case no. C649/2012 (Judgment handed down on 5 November 2013). Accessed on <http://www.saflii.org/za> (7 November 2013).

¹²⁰² *Cloud Hamandawana and Dispute Resolution Centre & others* at para 16.

¹²⁰³ *Cloud Hamandawana and Dispute Resolution Centre & others* at para 18.

not a fixed term employee after all, it is not always the case. Fixed term employees may be left without a remedy because they do not fit the description in certain instances.¹²⁰⁴

4.2 The labour dispute resolution institutions

In Chapter VII of the LRA the CCMA and the Labour Court is established. Both these labour forums have jurisdiction to hear unfair dismissal disputes.¹²⁰⁵ Therefore the CCMA is a creature of statute and it derives its jurisdiction out of the legislation.¹²⁰⁶ As a general rule, it cannot decide on the scope of its own jurisdiction. It can only make a ruling regarding its jurisdiction for the sake of convenience. Whether or not it has jurisdiction or not in the particular matter is a matter that has to be decided by the Labour Court.¹²⁰⁷

The LRA places an obligation on the CCMA to perform any other duties imposed on it and to which it is authorised to perform in terms of the LRA and other legislation.¹²⁰⁸ Conciliation in the CCMA is mandatory. The commissioner who is appointed to the case must try to resolve the dispute between the employer and the employee within 30 days of referral thereof or within the time that is agreed upon between the employer and employee.¹²⁰⁹ If a dispute remains unresolved it may either be referred back to the CCMA for arbitration or for adjudication by the Labour Court depending on the nature of the dispute. If conciliation fails, the employee must refer the dispute for arbitration or adjudication within 90 days from the date on which the arbitrator issues the certificate of non-resolve.¹²¹⁰

The LRA determines that an employee may refer a dispute to the Labour Court if the alleged reason for the dismissal is one which qualifies as being automatically unfair or based on operational requirements or if it is related to the employee's participation in a

¹²⁰⁴ See the discussion under in Ch 5 under 5.3.

¹²⁰⁵ Section 191(5) of the LRA.

¹²⁰⁶ In *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 ILJ 2588 (LC) at para 7 it was held that '[t]he CCMA is a creature of statute and hence it only has jurisdiction over those disputes referred to it in terms of the LRA.'

¹²⁰⁷ *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 ILJ 2588 (LC) at paras 8 - 9.

¹²⁰⁸ Section 115(4) of the LRA.

¹²⁰⁹ Section 135(1) of the LRA.

¹²¹⁰ If a dispute that is referred to the CCMA remains unresolved after the conciliation period, the commissioner must issue a certificate indicating that the dispute remains unresolved. In this regard see s 135(5) of the LRA. See also ss 191(11)(a) and 136(1)(b) of the LRA.

strike or due to the fact that the employee refused to join a trade union or was refused membership or expelled from a trade union. A bargaining council having jurisdiction or the CCMA must arbitrate a dispute in instances where the reason why he or she was dismissed is related to his or her conduct or capacity, if the employer constructively dismissed the employee or if the employee is unaware of the reason for the dismissal.¹²¹¹

The director may also, upon request of a party to the dispute, refer the dispute to the Labour Court if he believes that it is appropriate for the Labour Court to entertain the dispute due to the reason for the dismissal, the questions of law raised or the complexity of the dispute, if there are conflicting arbitration awards that need to be resolved or if it is in the public interest to do so.¹²¹²

Although the EEA does not contain similar time limits in which the matter must be referred after conciliation, in *NEHAWU obo Mofekeng & others v Charlotte Theron Children's Home*¹²¹³ it was held that the reasonable time period would be 90 days.

If an unfair dismissal dispute is allegedly automatically unfair, based on operational requirements or connected to joining a trade union, the Labour Court will entertain the dispute and not the CCMA.¹²¹⁴ The LRA declares that the Labour Court has, subject to the Constitution and s 173, exclusive jurisdiction in respect of all matters that elsewhere in terms of the Act or in terms of any other law fall within its jurisdiction, except in as far as the LRA provides otherwise.¹²¹⁵ The Labour Court also shares jurisdiction with the High Court in respect of alleged violations or threats of violation, by the State acting as employer, of any fundamental right and concerning the constitutionality of an executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer.¹²¹⁶

If an unfair dismissal dispute is adjudicated by the Labour Court an appeal against the decision to the Labour Appeal Court is possible.¹²¹⁷ The Labour Appeal Court was

¹²¹¹ Section 191(2)(b) and 191(5) of the LRA.

¹²¹² Section 191(6) of the LRA.

¹²¹³ *National Education Health and Allied Workers' Union obo Mofekeng & others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC) at 1572H.

¹²¹⁴ Section 191(5)(i) – (iv) of the LRA.

¹²¹⁵ Section 157(1) of the LRA.

¹²¹⁶ Section 157(2) of the LRA.

¹²¹⁷ Section 173(1) of the LRA.

established in terms of the LRA to be the final court of appeal in all labour disputes falling within its exclusive jurisdiction.¹²¹⁸ Nevertheless, the Constitution determines that the Supreme Court of Appeal is to be the highest court of appeal except in constitutional matters.¹²¹⁹ Consequently the Supreme Court of Appeal has jurisdiction to hear appeals from the Labour Appeal Court.¹²²⁰ As a result, the Supreme Court of Appeal which is not specialised in labour disputes can hear a further appeal.¹²²¹ From there, it may be possible to approach the Constitutional Court. The Constitutional Court has final jurisdiction in all matters relating to the interpretation and application of legislation that was enacted to give effect to the right to fair labour practices.¹²²²

Clearly the Legislature did not intend to include the extra step into the labour dispute resolution system. The effect of this is that labour disputes are exposed to unwarranted delays. This can have serious effects on the effectiveness of the system and ultimately the attainment of social justice. The availability of the primary remedy provided for in terms of the LRA becomes negated to a large extent.¹²²³

4.2.1 Concurrent jurisdiction of the labour courts and civil courts

Fixed term employees are protected against exploitation by employers at common law in terms of the general principles of the law of contract as well as through legislation.¹²²⁴ There was always a clear divide between the common law contract of employment and the statutory labour dispensation. Whereas the common law remedies for breach of contract were utilised in circumstances where unlawful conduct was alleged, the labour legislation was used to test the fairness of labour policies and practices.¹²²⁵ The enactment of the fundamental right to fair labour practices in the Constitution has extended jurisdiction. The right to fair labour practices has placed many incidents which were not originally regulated in the individual employment relation within the scope of judicial scrutiny.¹²²⁶ This has resulted from a development of the common law in terms

¹²¹⁸ Section 167 of the LRA.

¹²¹⁹ Section 168(2) of the Constitution.

¹²²⁰ *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at paras 5 & 33.

¹²²¹ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 17.

¹²²² *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) at para 15.

¹²²³ See the discussion under 51 in Ch 3.

¹²²⁴ Froneman AJA in *Fedlife Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

¹²²⁵ *Fedlife Ltd v Wolfaardt* at paras 3 - 4.

¹²²⁶ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 25.

the Constitution to harmonise the common law with the right to fair labour practices as entrenched in s 23 of the Constitution.¹²²⁷

The question as to whether or not this is a positive development was considered in *Nakin v MEC, Department of Education, Eastern Cape Province & another*.¹²²⁸ Froneman J held that coherent labour law can be developed in different courts as long as the courts all give effect to the right to fair labour practices. The content of rights should recognise the interconnectedness between the right and the fundamental rights that employees enjoy. The court also opined that coherence of the labour law jurisprudence is not determined by its development in one exclusive forum, 'but rather by the degree to which it gives proper expression to the constitutional entitlement of everyone...to fair labour practices.'¹²²⁹

Depending on how a claim is framed, either the common law or the labour legislation may be utilised by a fixed term employee.¹²³⁰ It is possible for an unfair labour practice dispute to be fashioned as a statutory claim or as a constitutional one.¹²³¹ An employee may institute an unfair labour practice action against an employer in the High Court and the Labour Court simultaneously, or in sequence.¹²³² In appropriate circumstances an aggrieved applicant could probably sue and be compensated for both unfair dismissal in the Labour Court and breach of contract in the High Court. This situation is clearly envisaged by the LRA which provides that an employee is entitled to sue for damages

¹²²⁷ *Old Mutual Life Assurance Co SA v Gumbi* [2007] 8 BALR 699 (SCA) at paras 1 & 4 - 5.

¹²²⁸ *Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] 2 All SA 559 (Ck) at para 37.

¹²²⁹ *Nakin v MEC, Department of Education, Eastern Cape Province & another* at para 30.

¹²³⁰ Section 77(3) of the BCEA. See also *Majake v Commission for Gender Equality & others* (2009) 30 ILJ 2349 (SGJ) at 2357C.

¹²³¹ *Simelela & others v Member of the Executive Council for Education, Province of the Eastern Cape & another* (2001) 22 ILJ 1688 (LC) at 1690.

¹²³² *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA) at 1557D - E. However, see *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) at paras 25 - 27 & 56. An important proviso is established. In this case, the SCA noted that an employee could not refer a claim based on unfair labour practice or unfair dismissal to the civil courts based on breach of contract if no specific provision to this effect had been included in the contract of employment. See also *Booyesen v SAPS & another* (2009) 30 ILJ 301 (LC) at para 37 in which Cheadle AJ comments that '[t]he right to fair labour practices is given effect to by the LRA and other labour legislation. Apart from challenges to the constitutionality or interpretation of that legislation or the development of the common law where there is no legislation, the right plays no other role and does not constitute a separate source of action.' See *Mlokoti v Amathole District Municipality & another* (2009) 30 ILJ 517 (E) which is different, but related to the above. Pickering J (at 523A - B) considered the fact that neither the LRA nor the EEA provided a remedy to the applicant as an indication that the High Court did have the required jurisdiction.

for breach of their employment contract over and above any compensation awarded in terms of s 194 of the LRA.¹²³³

In 2010 a very important decision was made that materially affects all employees' right to refer a dispute based on an unfair dismissal for adjudication to the ordinary courts. In *SA Maritime Safety Authority v McKenzie*¹²³⁴ the employee, after receiving a year's compensation in settlement from his previous employer for unfair dismissal, instituted a civil claim against them in the amount of R5.2 million which he calculated as his salary until retirement age had he not been unfairly dismissed. SAMSA challenged the jurisdiction of the High Court to entertain the claim.¹²³⁵ The Supreme Court of Appeal decided that the LRA's unfair dismissal and unfair labour practice provisions were intended to be self-standing. The court's approach was that remedies should be sought in terms of the unfair dismissal or unfair labour practice provisions in the LRA and that an employee could not refer a claim to the civil courts based on breach of contract in the absence of a specific provision to this effect in the contract of employment.¹²³⁶

In other words, if the employer and the employee did not include a stipulation in the contract of employment that specifically provides access to the civil courts in case of a breach of contract which would also be a dismissal, the remedies provided for in the LRA would be the only available recourse.

However, if the dismissal is challenged as a result of the fact that it had been executed in an unconstitutional fashion, say for instance, the employer discriminated unfairly against the employee the High Court would have jurisdiction to hear the matter. In *Gcaba v Minister for Safety and Security & others*¹²³⁷ it was decided that, in terms of the LRA, the Labour Court has concurrent jurisdiction with the High Court in relation to threatened violation of fundamental rights entrenched in the Bill of Rights.¹²³⁸

Fixed term employees' statutory rights and their constitutional rights may in certain circumstances overlap. They may be left with a choice between the mechanisms

¹²³³ Section 195 of the LRA. See also Grogan *Employment Rights* (2010) at 97.

¹²³⁴ *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

¹²³⁵ *SA Maritime Safety Authority v McKenzie* at para 5.

¹²³⁶ *SA Maritime Safety Authority v McKenzie* at paras 25 - 27.

¹²³⁷ *Gcaba v Minister for Safety and Security & others* [2009] 12 BLLR 1145 (CC).

¹²³⁸ *Gcaba v Minister for Safety and Security & others* at paras 71 – 74. Section 157(2) of the LRA expressly provides that in any matter in which the rights entrenched in the Bill of Rights would be affected which is labour related, the Labour Courts and the High Court will both have jurisdiction.

provided for in terms of the Constitution or the labour legislation that was designed to give effect to the constitutional right. But, this may also necessitate referral of various claims to different forums in order to attain a fair result. Despite the potential to claim, many fixed term employees may be practically excluded from utilising the various remedies provided for, due to the expenses attached to referring a dispute to the Constitutional Court or to various courts.

In as far as public servants are concerned, the High Court and Labour Courts are divided on whether or not labour disputes should be permitted in the civil courts. In certain decisions it is made clear that employers' actions in the public service do not fall within the definition of 'administrative action'¹²³⁹ as contained in the PAJA and that the High Court is therefore not the correct forum to hear such disputes.¹²⁴⁰ In *Provincial Commissioner, Gauteng South African Police Service & another v Mnguni*¹²⁴¹ an employee was dismissed for his misconduct. He appealed against the decision to dismiss him, but the internal appeal failed. The employee then approached the High Court for the review of the Appeal Tribunal's decision.¹²⁴²

In the Supreme Court of Appeal two points *in limine* were considered. The first point that was raised was that the High Court lacked jurisdiction to hear the dispute because labour matters should be referred to the CCMA or a bargaining council having jurisdiction. The second point was, that to render the decision of the Appeals Tribunal reviewable the contested action must qualify as 'administrative action' as envisaged by the PAJA.¹²⁴³ The employer contended that the dismissal did not qualify as administrative action. However, the employee based his claim on the fair labour practice provisions in the LRA and not the PAJA. The question was raised whether or not the employee had a separate right to challenge the decision of the appeals tribunal in the High Court based on the common law. It was held that the dispute was a labour dispute that had to be referred to the labour forums. The referral of the claim to the High Court

¹²³⁹ Section 1 of the PAJA.

¹²⁴⁰ *SAPU & another v National Commissioner of the South African Police Service & another* (2005) 26 ILJ 2403 (LC) at paras 54 - 56.

¹²⁴¹ *Provincial Commissioner, Gauteng South African Police Service & another v Mnguni* [2013] JOL 30150 (SCA).

¹²⁴² *Provincial Commissioner, Gauteng South African Police Service & another v Mnguni* at paras 1 – 2.

¹²⁴³ *Provincial Commissioner, Gauteng South African Police Service & another v Mnguni* at paras 11 & 16.

for common law review of the Appeals Tribunal's confirmation of the employee's dismissal was found to have been bad in law.¹²⁴⁴

Another view is that the courts should all have jurisdiction to entertain administrative law disputes between employers and employees since both labour law principles and administrative law principles are underpinned by the Constitution. It is also recognised that these rights may in certain instances overlap.¹²⁴⁵

In *Chirwa v Transnet*¹²⁴⁶ the court held that employment related disputes involving public sector employees ought to be dealt with in terms of the mechanisms established in the LRA and not those provided for in the Promotion of Administrative Justice Act. However, in *Hendricks v Cape Peninsula University of Technology & others*¹²⁴⁷ Saldanha J stated that if an unfair dismissal case was couched upon a breach of contract, the Labour Court would not have exclusive jurisdiction. Likewise in *Makhanya v University of Zululand*¹²⁴⁸ Nugent JA confirmed that *Chirwa v Transnet*¹²⁴⁹ cannot be interpreted as stripping the High Court of its ordinary jurisdiction to enforce contracts of employment since such a right is unequivocally conferred by the BCEA.¹²⁵⁰ A breach of the common law right to fair dealing can accordingly be pursued through the mechanism afforded by the BCEA which confers concurrent jurisdiction on the Labour Court together with the High Court to adjudicate such disputes.¹²⁵¹

¹²⁴⁴ *Provincial Commissioner, Gauteng South African Police Service & another v Mnguni* at paras 17, 20 & 29.
¹²⁴⁵ *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* [2006] 4 BLLR 385 (E) at paras 35 - 44. See also *Transnet Ltd & others v Chirwa* [2007] 1 BLLR 10 (SCA) at paras 58 - 65. For a contrasting view see *Fredericks & others v MEC for Education & Training, Eastern Cape & others* [2002] 2 BLLR 119 (CC) at para 40.

¹²⁴⁶ *Chirwa v Transnet* 2008 (4) SA 367 (CC) at para 116.

¹²⁴⁷ *Hendricks v Cape Peninsula University of Technology & others* (2009) 30 ILJ 1223 (C) at 1249D - E.

¹²⁴⁸ *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA) at paras 14, 21, 73, 76, 78 & 91.

¹²⁴⁹ *Chirwa v Transnet* 2008 (4) SA 367 (CC) at 1557D - E.

¹²⁵⁰ Section 77(3) of the BCEA.

¹²⁵¹ See also *Kriel v Legal Aid Board* (2009) 30 ILJ 1735 (SCA) at 1740 - 1744. The court held that the High Court does have jurisdiction to entertain a review, but only if on the facts it qualifies as administrative action for purposes of PAJA will a review be possible. In *De Villiers v Minister of Education, Western Cape Province & another* (2009) 30 ILJ 1022 (C) at 1025C - D & 1028B - D the court explained that the Constitution draws a distinction between the right to fair administrative action and the right to fair labour practices. This is where the distinction between labour actions and administrative actions lies. An employee in the public service therefore has no choice to refer a matter to the High Court rather than follow the mechanisms provided for in the LRA.

In *Old Mutual v Gumbi & Boxer Superstores Mthatha & another v Mbenya*¹²⁵² it was held that the LRA does not provide the Labour Court with exclusive jurisdiction to entertain all labour disputes. An employer's actions may give rise to more than one possible cause of action. In such a case, the employee may elect which cause of action he or she wishes to rely upon. The way in which the claim is couched will then determine which forum will have jurisdiction to entertain the dispute.

But, a claim that falls within the concurrent jurisdiction of the High Court and a special court cannot always be brought in both courts. Should an employee bring an application in two courts at once, he or she would be confronted in one court by either a plea of *lis pendens* (the claim is pending in another court) or of *res judicata* (the claim has been disposed of by the other court). A fixed term employee needs to choose one of the courts having concurrent jurisdiction in which to pursue the claim. Once an election has been made in this regard, the same claim cannot be brought before the other court. But, if a fixed term employee has two separate claims for the enforcement of two different rights, both claims can be pursued, simultaneously or sequentially in one court, or in more than one court having concurrent jurisdiction.¹²⁵³

In *Wardlaw v Supreme Mouldings (Pty) Ltd*¹²⁵⁴ the Labour Appeal Court held that the LRA clearly expresses that the Labour Court does not have exclusive jurisdiction in respect of matters if the LRA elsewhere provides otherwise. In *Tsika v Buffalo City Municipality*¹²⁵⁵ it was confirmed that the civil courts together with the Labour Courts have common law jurisdiction to entertain claims based on breach of employment contracts. In *Mogothle v Premier of the Northwest Province & others*¹²⁵⁶ it was held by Van Niekerk J that, which court would enjoy jurisdiction would depend on the way in which the application is canvassed. If it is evident that the relationship is one of employment and the remedies sought are those provided for in the LRA, the matter should not be pursued in the High Court.

¹²⁵² *Old Mutual v Gumbi* [2007] SCA 52 (RSA) at paras 5 - 8 and *Boxer Superstores Mthatha & another v Mbenya* at paras 6 - 7.

¹²⁵³ *Makhanya v University of Zululand* at para 27.

¹²⁵⁴ *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) at para 17.

¹²⁵⁵ *Tsika v Buffalo City Municipality* (2009) 30 ILJ 105 (E) at 121F - H & 129 - 130.

¹²⁵⁶ *Mogothle v Premier of the Northwest Province & others* at 613D. See also *Nonzamo Cleaning Services Co-operative v Appie & others* 2009 (3) SA 276 (Ck) at 290I - 291E.

If specific legislation is designed to regulate a constitutional right, a person complaining of an infringement of the right must seek relief under that statute. The exception to this rule would be if the person attacks the constitutionality of the legislative provision. If the legislation pertaining to unfair labour practices does not provide a remedy, employees may approach the High Court with a constitutional or institute a common law action.¹²⁵⁷

In other jurisdictions a clearer distinction is made regarding which court should be approached in labour matters. In Australia, a distinction is made between unfair dismissals and unlawful dismissals. The Fair Work Act contains a special provision pertaining to unlawful termination.¹²⁵⁸ In Australia a person cannot make a general protections dismissal application at the same time as an unfair dismissal application.¹²⁵⁹

In England, the Labour Court is the only court authorised to handle labour disputes. The Employment Tribunal Act deals with complaints of unfair dismissal. Much like in South Africa, employees may also sue employers for breach of contract or unlawful dismissal in the civil courts. However, the civil courts do not have jurisdiction to judge on the fairness of a dismissal.¹²⁶⁰

4.3 Legal technicality

In comparative terms South Africa's labour legislation is not currently very strict.¹²⁶¹ The perception that unfair dismissal is overregulated in the country can at least partially be attributed to the way in which the CCMA and the Labour Court has dealt with labour disputes.¹²⁶² The ILO's Committee of Experts observed¹²⁶³ that '...the opportunity for a worker to defend himself is related to the possibility of his being afforded an opportunity

¹²⁵⁷ *SA National Defence Union v Minister of Defence & others* (2007) 28 ILJ 1909 (CC) at para 51. For further information regarding the Constitutional Court's jurisdiction see Michelman F 'Rule of Law, legality and the supremacy of the Constitution' Ch 11 in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* 2nd edn (Juta 2005).

¹²⁵⁸ Section 772 of the Fair Work Act 28 of 2009.

¹²⁵⁹ Sections 385, 390 & 723 of the Fair Work Act 28 of 2009.

¹²⁶⁰ Section 111 of the Employment Rights Act of 1996.

¹²⁶¹ Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' (Development Policy Research 2007) at 4.

¹²⁶² Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' at 23.

¹²⁶³ Committee of Experts 'Protection Against Unjustified Dismissal General Survey' International Labour Conference 82nd Session, 1995. Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' at 22.

to be heard by the employer, without there being a need for an adversarial proceeding.¹²⁶⁴ It is evident that fair procedures must be followed in the termination of employment. Clearly the intention is that labour disputes should be amicably resolved in a non-formalistic way. This is not achieved in the current South African system.

Practical enforcement of rights is stifled by technical legal aspects to the extent that fixed term employees are sometimes denied the remedies afforded to them. There are over 160 000 referrals of labour disputes per annum. The majority of disputes are related to unfair dismissal. Employees must go through a long and often expensive conciliation, arbitration or adjudication process. If a dispute is not settled in the CCMA, it may take years to be resolved. The CCMA's processes are overly technical. At least a labour consultant is required. The huge number of review referrals has resulted in a huge backlog in the Labour Court causing further delays.¹²⁶⁵

4.3.1 The Code of Good Practice: Dismissal

The Code of Good Practice: Dismissal¹²⁶⁶ was promulgated at the same time as the LRA to provide guidelines on standards of fairness. The Code is not binding, but was intended to be used by employers as a guideline when exercising their powers of discipline and dismissal. Deviation from the standards set by the Code of Good Practice does not give rise to penalties, but it may lead to an adverse finding unless the deviation is justifiable. In addition, it was meant to set guidelines for the CCMA in assessing the fairness of a dismissal.¹²⁶⁷

The LRA imposes an obligation on 'any person interpreting or applying' the LRA to take the Code into account.¹²⁶⁸ Nevertheless, arbitrators have not regularly used the Code or referred to it in their arbitration awards. Employers have not been required to justify

¹²⁶⁴ The amicable resolution of disputes is also a biblical notion. Matthew 5:25 reads: 'Settle matters quickly with your adversary who is taking you to court. Do it while you are still together on the way, or your adversary may hand you over to the judge.'

¹²⁶⁵ Wits Business School 'Unfairly Dismissing the CCMA' accessed at <http://mg.co.za/article/2008-11-06-unfairly-dismissing-the-ccma> (4 November 2013). See also Waglay Basheer 'The proposed re-organisation of the Labour Court and the Labour Appeal Court' (2003) *Industrial Law Journal* 1223 at 1228.

¹²⁶⁶ The Code of Good Practice Dismissal is situated in Sch 8 of the LRA.

¹²⁶⁷ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at paras 75 – 76.

¹²⁶⁸ Section 203(3) of the LRA.

departing from it. This has contributed to the lack of consistency and predictability in the labour dispute resolution system.¹²⁶⁹

The Code of Good Practice: Dismissal has, like the LRA, remained unamended since 2002. The idea was that the Code would be updated regularly so as to provide a summary of the prevailing jurisprudence. This would assist in providing a legitimate, coherent, accessible and flexible jurisprudence to guide employer policy and practice, collective agreements and dispute resolution.¹²⁷⁰ As the principles that it contains have remained stagnant, the Code has degraded in importance and the employment arena has become over-juridified.¹²⁷¹ There has been a shift towards a strict system of court precedent. The Code was intended to make information directly accessible to the public. This has not happened as planned.¹²⁷²

Employers are often ignorant of procedural measures that they are required to follow until they are published and become generally enforceable.¹²⁷³ The Code of Good Practice: Dismissal has never included stipulations pertaining to dismissal of atypical employees, thus creating a loophole for employers.

It has become the norm to appoint legal representatives. This has resulted in expensive and complex labour disputes.¹²⁷⁴ The cost of dispute resolution for the state, employers and employees are high. This is contrary to the LRA's objective to achieve social justice.¹²⁷⁵

In *National Bioinformatics Network Trust v Jacobson*¹²⁷⁶ the over-formalisation of the labour arena is described as follows:

¹²⁶⁹ Bhorat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' (DPRU University of Cape Town 2010) at 6.

¹²⁷⁰ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at paras 75 - 76.

¹²⁷¹ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 24.

¹²⁷² Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 25. See also Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA: A Response to Halton Cheadle's Concept Paper' at 20.

¹²⁷³ A study conducted in 2004 indicates that the hours of work decreased for these employees while the earnings progressively increased without a negative employment response. See Hertz T 'Have Minimum Wages Benefited South Africa's Domestic Service Workers?' Development Policy Research Unit: Forum Paper 13 - 15 October 2004.

¹²⁷⁴ Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA. A Response to Halton Cheadle's Concept Paper' at 12.

¹²⁷⁵ Section 1 of the LRA.

¹²⁷⁶ See *National Bioinformatics Network Trust v Jacobson* [2009] 8 BLLR 833 (LC) at para 6.

'The applicant chose to ignore the informal workplace procedures prescribed by the Code of Good Practice and to conduct a disciplinary enquiry, at great expense to the taxpayer no doubt, in a form that would make any criminal court proud. I have previously had occasion to comment on the profitable cottage industry that has developed from the application of unnecessarily complex workplace disciplinary procedures, and how inimical the actions of some practitioners, consultants, so-called trade unions and employer organizations and the various other carpetbaggers who populate this industry are in relation to the objectives underlying the LRA.'

The imbalance in positions of the parties to disputes, as well as the legal technicality of labour dispute resolution, may be a major obstacle in the finalisation of labour disputes. The impediments to efficient usage of stipulations contained in the LRA may even prevent aggrieved fixed term employees from taking unscrupulous employers to task. This problem seems to be even worse for fixed term employees due to ambiguity of the legislative provision made applicable to them.

4.3.2 Too many review applications and appeals

Decisions made during conciliation and arbitration can be taken on review to the Labour Court¹²⁷⁷

A commissioner's arbitration award, unless it is an advisory award, is final and binding between the parties as if it is an order of the Labour Court.¹²⁷⁸ Whereas review was clearly intended as an exceptional mechanism, it has become the norm.¹²⁷⁹

There is a six week limit to file a review application in terms of s 145. A party who alleges that there was a defect¹²⁸⁰ in the arbitration proceedings may apply to the

¹²⁷⁷ Rules 14 & 22 of the CCMA Rules provides for the possibility of raising points *in limine* during conciliation and arbitration respectively. As soon as a commissioner makes a ruling regarding such a point *in limine*, a final and binding award capable of referral for review in terms of s 145 of the LRA would have been made.

¹²⁷⁸ Section 143(1) of the LRA.

¹²⁷⁹ *Shoprite Checkers (Pty) Ltd v CCMA & others* at para 23. In Benjamin & Gruen 'The Regulatory Efficiency of the CCMA: A Statistical Analysis' at paras 81 - 82 it is noted that the level of review applications, although not properly documented, is high. The CCMA has not met its aim of providing simple, non-legalistic and non-judicial procedures for dispute resolution. The Explanatory Memorandum that accompanied the LRA suggests that this was aimed at accommodating small businesses to deal with disputes without needing to involve legal representatives and consultants.

¹²⁸⁰ Section 145(2) of the LRA elaborates on the circumstances under which a 'defect' would be reviewable. The commissioner must have misconducted him or herself in the performance of his or her duties or made him or herself guilty of a gross irregularity, or exceeded his or her powers as an arbitrator or the order must have been otherwise obtained in an irregular fashion. Despite the restrictions contained in s 145, the Labour Court also has the power to review the performance of any function in that was performed in terms of the LRA by virtue of s 158(g) of the LRA.

Labour Court to have the arbitration award set aside.¹²⁸¹ An application for review in terms of s 145 of the LRA must be referred within six weeks of the date of service of the arbitration award or in case of corruption within six weeks of discovering the alleged corruption.¹²⁸²

There is no prescribed period for referral of a review application in terms of s 158(1)(g) of the LRA. In such referrals, the courts have referred to the six week time limit in s 145 of the LRA to determine what would be a reasonable time in which to perform this procedural step.¹²⁸³

A point or points *in limine* could be raised at any stage of the dispute resolution procedure in the CCMA.¹²⁸⁴ A commissioner must, if a point *in limine* is raised in conciliation, request the referring party to prove that the CCMA has the required jurisdiction to continue with the conciliation process.¹²⁸⁵ Once an award is made regarding such a point *in limine*, it would constitute a final award which can be taken on review.¹²⁸⁶ It takes about a year for a matter to be reviewed. Employers often use review applications as a means to delay finalisation of labour disputes.¹²⁸⁷

The Rules for the Conduct of Proceedings before the CCMA (CCMA Rules) allow an arbitrating commissioner to determine a jurisdictional point at arbitration provided that it has not been raised during conciliation.¹²⁸⁸ If a jurisdictional point is raised at conciliation or if it becomes apparent during conciliation proceedings that a jurisdictional issue has arisen, the conciliation commissioner is compelled to deal with the issue and make a ruling (which is subject to review by the Labour Court. However, if a jurisdictional point has not been raised at conciliation, the arbitrating commissioner must

¹²⁸¹ Sections 145 & 158 of the LRA.

¹²⁸² Section 145(1)(a) & (b) of the LRA.

¹²⁸³ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at 411. See also *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* (2000) Ltd t/a Bradlows Furnishers v Laka NO & others (2001) 22 ILJ 641 (LAC) at paras 17 – 20.

¹²⁸⁴ Rule 14 of the CCMA Rules applies when a jurisdictional point is raised during conciliation and Rule 22 applies if an interlocutory point is raised during arbitration proceedings.

¹²⁸⁵ *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 ILJ 2588 at para 16.

¹²⁸⁶ As mentioned above any final award may be referred on review to the Labour Court in terms of either s 145 or s 158 of the LRA.

¹²⁸⁷ *Chillibush Communications (Pty) Ltd v Gericke & others* (2010) 31 ILJ 1350 (LC) at paras 10 – 11.

¹²⁸⁸ Rule 22 of the Rules for the Conduct of Proceedings before the CCMA.

entertain the jurisdictional point notwithstanding the fact that a certificate of non-resolve has already been issued.¹²⁸⁹

In 2009/2010 153,657 cases were referred to the CCMA. In about twenty percent of these cases, it was decided that the CCMA lacked the required jurisdiction to entertain the disputes.¹²⁹⁰

In *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others*¹²⁹¹ it was held that the Labour Appeal Court should avoid unnecessary delays in labour dispute resolution. If the merits of a case have not yet been heard this should be done before appeals are entertained which will not bring finality to the matter.¹²⁹²

Arbitration awards were not intended to be the first of many steps in the resolution of labour disputes. The commissioners' ruling was supposed to be final and binding. The delays in the process of review of an employer's decision to terminate an employee's services do not contribute to the attainment of justice.¹²⁹³ Presiding officers should restrict delays by not allowing unnecessary postponements for the referral of disputes on review.¹²⁹⁴ Interlocutory disputes should also be disposed of quickly. Both the employer and the employee should be provided with the opportunity to resolve the dispute on its merits without undue delay.¹²⁹⁵

Expeditious resolution not only entails speedy referral processes, but also limitation of the number of appeals to higher courts. The Labour Appeal Court was intended to be the final court of appeal except in constitutional matters.¹²⁹⁶

¹²⁸⁹ *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 ILJ 2588 at para 14.

¹²⁹⁰ RIA of 2010 at 105.

¹²⁹¹ *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* 2012 (1) SA 321 (CC).

¹²⁹² *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* at para 76.

¹²⁹³ Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA: A Response to Halton Cheadle's Concept Paper' at 19.

¹²⁹⁴ In *The Only Professional Modern Autobody CC t/a Modern Collision Centre v MISA obo Gouws & others* [2013] JOL 30195 (LC) at paras 21 & 32 – 33 Molahlehi J held that the discretion to grant or refuse a postponement rest with the arbitrator. The duty is on the applicant to make out a case and persuade the arbitrator that there exists a basis upon which a postponement should be granted. In a review application the grounds of appeal rendering the arbitration award susceptible to review must be set out and substantiated by the necessary material facts.

¹²⁹⁵ *SA Eagle Versekeringsmaatskappy Bpk v Hartford* 1992 (2) SA 786 (A) at 791B - D. See also *Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) at 548H - I.

¹²⁹⁶ Bronstein A *International and Comparative Labour Law: Current Challenges* (Palgrave McMillan International Labour Organisation 2009) at 27.

Unnecessary delays in dispute resolution proceedings should be prevented. As interlocutory orders often lack finality, Courts have always been disinclined to grant leave to appeal such orders. A good case on balance of convenience must be made out in these cases before leave to appeal is granted. There exists a general tendency to discourage piece-meal consideration of cases.¹²⁹⁷

4.3.3 Labour disputes take very long to resolve

By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. It is in the public interest that labour disputes be resolved speedily by experts appointed for that purpose.¹²⁹⁸

The LRA, in principle, aims for expedient resolution of disputes.¹²⁹⁹ In *Shoprite Checkers (Pty) Ltd v CCMA & others*¹³⁰⁰ it was held that the philosophy and motivation for the enactment of the LRA are directed to cheap and expedient resolution of labour disputes. The implications brought about for employers and employees necessitate speed in the resolution of these disputes. The system has failed both employers and employees by the problems and uncertainties that cause delays in the dispute resolution process.

The main purpose of the establishment of the CCMA was to ensure fast and inexpensive resolution of labour disputes.¹³⁰¹ The CCMA is responsible for compulsory mediation and also arbitration of certain disputes unless the employer and employee have agreed to private mediation and arbitration or fall within the jurisdiction of an accredited bargaining council.¹³⁰² A Commissioner may decide what procedure will be followed in the arbitration proceedings before the CCMA or the bargaining council. This

¹²⁹⁷ *NEHAWU v University of Cape Town* at para 25. See also *S v Boesak* 2001 (1) SA 912 (CC) at para 12.

¹²⁹⁸ *NEHAWU v University of Cape Town* (CC) at paras 30 - 31.

¹²⁹⁹ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at 411; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* 2010 (2) SA 269 (CC) at paras 12 – 13 and *Bezuidenhout v Johnston NO & others* (2006) 27 ILJ 2337 (LC) at para 26.

¹³⁰⁰ *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] 7 BLLR 619 (SCA) at para 34.

¹³⁰¹ This accords with the purpose of the LRA as set out in s 1(d)(iv) thereof, namely, to promote the effective resolution of disputes. See also *Chilibush Communications (Pty) Ltd v Gericke and others* (2010) 31 ILJ 1350 (LC) at para 19.

¹³⁰² Section 191(1) of the LRA. See also Grogan *Employment Rights* (2010) at 7.

procedure must be appropriate and aimed at determining the dispute quickly and fairly. The merits of the case must be dealt with and legal formalities must be limited.¹³⁰³

Although South Africa's legislation proposes accreditation of bargaining councils and private agencies to assist in the resolution of disputes,¹³⁰⁴ the reality is that the CCMA is still required to deal with most of the unfair dismissal disputes that are referred.

Conciliation of disputes was intended to limit the recourse to and cost associated with adjudication and arbitration of labour disputes. If the outcome was not a settlement at conciliation, this process was intended to restrict the matters in dispute considerably so as to limit the costs. Although the CCMA was intended to be a much more effective mechanism than conciliation boards and the industrial court, it has failed to live up these expectations.¹³⁰⁵

The reason for the establishment of specialised courts was that through their skills and experience labour disputes would be resolved expediently.¹³⁰⁶ In the Labour Appeal Court there are often delays of twelve to eighteen months between the date of hearing and the date that the judgment is handed down. This is unacceptable considering the reason for the establishment of specialist courts. The Supreme Court of Appeal on average hands down judgments within three months of the hearing.¹³⁰⁷ In international terms the time that it takes to resolve a labour dispute in South Africa is comparable to that of Germany. In 2008 the data shows that the average period expended in dispute resolution in Germany was 14.2 months and appeals took an additional 5.7 months.¹³⁰⁸ However, in Germany only about 36.2 percent of disputes referred concern unfair dismissal.¹³⁰⁹

¹³⁰³ Section 138(1) of the LRA.

¹³⁰⁴ See the preamble to the LRA. Certain bargain councils that have recently been accredited and the conditions related to conduct of bargaining councils can be viewed in Notice 390 of 2013 GG No. 36376.

¹³⁰⁵ Borat & Cheadle 'Labour Reform in South Africa and a Synthesis of Policy Suggestions' DPRU Working Paper 09/139 (September 2009) at 26.

¹³⁰⁶ *NEHAWU v University of Cape Town & others* 2003 (3) SA 1 (CC) at para 30.

¹³⁰⁷ Borat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' at 32.

¹³⁰⁸ Statistisches Bundesamt, destatis (Federal Statistic Office), Rechtspflege - Arbeitsgerichte 2008, Fachserie 10 Reihe 2.8 86 (part 5.3.3 items 20 and 22) accessed at <https://www.ec.destatis.de/csp/shop/sfg/bpm.html.cms.cBroker.cls?cmspath=struktur,vollanzeige.csp&ID=1023242> (20 March 2013).

¹³⁰⁹ This is according to the data in 2008 for Germany's Labour Courts. Statistisches Bundesamt, destatis (Federal Statistic Office), Rechtspflege - Arbeitsgerichte 2008, Fachserie 10 Reihe 2.8, 2009 20.

4.4 Costs of litigation

Whereas dispute resolution processes in the CCMA are free,¹³¹⁰ litigation in the Labour Court certainly is not. Employers logically are usually in a stronger financial position than unemployed employees. While a labour dispute is pending, South African fixed term employees are not allowed to return to their posts and earn an income. If they do not find other work during such time they will have to pay for the referral to the Labour Court out of savings.¹³¹¹

Delays and costs¹³¹² related to dispute resolution are often far more prejudicial to the 'victim' of the unfair treatment than the alleged guilty party. Employers are also more likely to have access to legal representation.¹³¹³ Court cases are emotionally taxing, time consuming and expensive. The delays and legal costs associated with possible appeals and reviews may make access to social justice unaffordable for individual litigants. Orders for the payment of legal costs can be made against an unsuccessful fixed term employee. In terms of the Rules Regulating the Conduct of the proceedings of the Labour Court (Labour Court Rules), the costs of one advocate and one attorney may be payable. It is also possible for the court to, upon application, allow for the payment of fees for additional advocates and attorneys.¹³¹⁴ The costs must be taxed according to the order of the court or any agreement which may have been reached between the parties. In the absence of such an agreement, the High Court tariff will apply.¹³¹⁵

Attorneys and advocates often rely on contingency fees when representing employees in unfair dismissal disputes.¹³¹⁶ Recently it was held that legal representatives are only entitled to a contingency fee of a maximum of 25 percent of the total amount of compensation and actual costs incurred. In *De la Guerre v Ronald Bobroff & Partners*

¹³¹⁰ RIA of 2010 at 116.

¹³¹¹ Notably in Germany employees can continue working during the dispute resolution process. Section 102 of the Works Constitution Act of 2001.

¹³¹² Section 162 of the LRA confers discretion on this court to make orders for costs based on the requirements of law and fairness.

¹³¹³ *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* (2003) 23 ILJ 1712 (LC) at 1719.

¹³¹⁴ Rule 24(1) and (2) of the Labour Court Rules.

¹³¹⁵ Rule 24(3) of the Labour Court Rules.

¹³¹⁶ Section 2 of the Contingency Fees Act 66 of 1997 permits the use of contingency fee agreements in regulation of amounts that legal representatives may charge if they work on a no win-no fee basis.

*Incorporated and others*¹³¹⁷ Fabricius J was of the opinion that the contingency fee that had been agreed upon between the attorney and his client in this case was unlawful since the common law determines that legal practitioners are only entitled to reasonable remuneration for actual work done.¹³¹⁸ Therefore, it is possible for the court to impede if necessary.

The RIA of 2010 indicates that a legal expert's fee for drafting an application to the Labour Court is approximately R7 000. As far as representation is concerned, the first court day will, according to this assessment, cost approximately R26 000 and any subsequent days an additional R12 000 per day.¹³¹⁹ This estimated cost does not include all the legal costs payable by an employee. The fees payable on attorney and client basis and attorney and own client costs are excluded. Consultation fees, attendance and perusal costs, drafting and drawing costs of subsequent pleadings and miscellaneous and travel expenses are not accounted for. The cost for the finalisation of a labour dispute can be, conservatively speaking, at least double this amount.¹³²⁰ Litigation in the civil courts is usually much more time consuming than the average dispute resolution process at the CCMA.

The labour dispute resolution arena has become over-formalised. The processes have become increasingly technical. Role-players such as legal consultants, legal representatives and even commissioners, who often cannot claim to be specialists, pander the view and revel in the ignorance of employees that are plunged into a legal minefield. The consequence is that after the battle is fought, very often both the employer and the employee are left blood-nosed. But, it will logically often be harder for the employee to escape the financial drudgery since employers are usually wealthier than employees.¹³²¹

¹³¹⁷ *De la Guerre v Ronald Bobroff and Partners Incorporated & others.*

¹³¹⁸ *De la Guerre v Ronald Bobroff and Partners Incorporated & others* at paras 10 - 11, 13, 14.2 & 15.

¹³¹⁹ RIA of 2010 at 114.

¹³²⁰ See rules 69 and 70 of the Uniform Rules of Court: Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (High Court Rules) and the items and fees indicated therein for calculation of costs.

¹³²¹ In the Memorandum of the Objects of Objects of the Labour Relations Amendment Bill of 2012 at 18 accessed at <https://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf> (21 March 2013) it is noted that 'the primary reason for providing statutory protection against unfair dismissal and for providing remedies for unfair dismissal as a species of unfair labour practice, is the inequality of bargaining power between employer and employee.' See also *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC) at para 41.

Normally, a successful litigant would be able to recover his or her legal costs from the unsuccessful litigant on a party and party basis. The logic behind this is that the successful litigant would be indemnified against the expenses incurred of having approached a court to uphold his or her own rights. However, costs do not always follow suit in labour disputes. The Labour Court may order an employer or an employee to pay the costs. The presiding officer is given wide discretion related to awarding costs. This determination is made based on what the presiding officer considers to be fair.¹³²²

It may happen that a successful litigant is nevertheless required to pay the other party's legal costs. In *University of Pretoria v CCMA & others*¹³²³ the Labour Appeal Court made a rather strange finding in this regard. It was held that, because the fixed term employee was an 'individual litigant involved in litigation to vindicate her rights', no order as to costs should be made. In the premise of the fact that the court held that the fixed term employee had not been dismissed it is unclear what right the court was speaking of. Nevertheless, this matter serves as a good example of how labour disputes can have the effect of leaving both parties worse off than before.

Legal costs are also at times awarded against a party in a labour dispute when the court feels that it would be just to order such payment.¹³²⁴ The costs associated with the referral of labour disputes in South Africa may outweigh the benefits of successfully proving that a dismissal was unfair. The uncertainty regarding a cost order may deter referrals and effectively deny fixed term employees their right to social justice.¹³²⁵

¹³²² Section 162(1) of the LRA.

¹³²³ *University of Pretoria v CCMA & others* [2011] ZALAC 25 (LAC) at para 23.

¹³²⁴ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* (2012) 33 ILJ 1171 (LC) at para 28. See also *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) at para 62 in which the court held that the employer had acted in a deplorable manner towards the employee and accordingly it was held that the employer 'ought to be mulcted in costs'.

¹³²⁵ Section 1 of the LRA determines that the purpose of the legislation is the advancement of 'economic development, social justice, labour peace and the democratisation of the workplace.'

Concluding remarks

The dispute resolution process is overly technical. It is possible for a party to raise a point *in limine* at any time during the proceedings.¹³²⁶ There are also many jurisdictional issues: A matter that is referred to the CCMA for resolution may follow an extended route to the Labour Court, Labour Appeal Court, Supreme Court of Appeal and even the Constitutional Court. This can, of course, lead to major delays in the finalisation of labour disputes.¹³²⁷ Cases are referred on review on interlocutory points without bringing them any closer to finality. It may even happen that these reviews of points *in limine* could result in matters being disposed of without the merits ever having been heard.¹³²⁸

Despite the availability of various remedies, the dispute resolution process may be prohibitively expensive for some fixed term employees. They may be required to refer a dispute to more than one forum in order to attain a meaningful remedy.¹³²⁹ Although South Africa's dispute resolution system is aimed at expedience, labour matters often take extremely long to resolve.¹³³⁰

Cost orders in the Labour Court do not always follow suit. The risk of a possible cost order may prevent referral of disputes. The costs associated with labour dispute resolution often outweigh the remedies provided for in the LRA.¹³³¹

In the next chapter, the way in which the dismissal protection has been interpreted, is scrutinised.

¹³²⁶ See the discussion under 4.1 and 4.3.2 above.

¹³²⁷ See the discussion under 4.2 above.

¹³²⁸ This for instance happened in *Geldenhuis and University of Pretoria* (2008) 29 ILJ 1772 (CCMA). A point *in limine* regarding the CCMA's jurisdiction to entertain a dispute in terms of s 186(1)(b) of the LRA when the fixed term employee had a reasonable expectation of permanent appointment resulted in review proceedings. The employer who was unsuccessful in the Labour Court then took the matter on appeal which succeeded. The effect was that the merits of this matter were never heard. See also the discussion in Ch 5 under 5.3.

¹³²⁹ See the discussion under 4.4 above.

¹³³⁰ This is discussed under 4.3.3 above.

The correct approach to interpretation of s 186(1)(b) of the LRA



Introduction

In this chapter, the way in which the courts have interpreted s 186(1)(b) of the LRA is scrutinised against the prescripts set by the Constitutional Court for proper interpretation of the LRA as a piece of social legislation. Firstly, the provisions as set out in the Constitution and the LRA relating to interpretation are considered. Thereafter, some benchmark cases in point are discussed and analysed.

Reviews and appeals on the jurisdictional issue of whether or not a fixed term employee who harbours an expectation of permanent employment is covered by s 186(1)(b) of the LRA are based on the two different constructs, a literal approach and a purposive one. This difference in construct indicates ambiguity in the wording of the provision. The appropriateness of a construct limiting the unfair dismissal of fixed term employees to a temporary expectation of renewal is evaluated.

5.1 Interpretation of the LRA

The Constitution places a duty on courts, tribunals and forums to promote the values underlying an open and democratic society when interpreting the Bill of Rights. In addition, it determines that international law must be considered and foreign law may be instructive.¹³³² Therefore, courts are required to take cognisance of international treaties and also of standards applied in different countries.

The values entrenched in the Constitution must also be promoted by courts, tribunals and forums when interpreting legislation.¹³³³ The LRA expressly states that it was

¹³³¹ See the discussion under 4.4 above.

¹³³² Section 39(1) of the Constitution.

¹³³³ Section 39(2) of the Constitution. See also *S v Boesak* 2001 (1) SA 912 (CC) at para 14; *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938

enacted with the purpose of effecting and regulating the right to fair labour practices as conferred by the Constitution.¹³³⁴ The LRA must consequently be construed in compliance with the Constitution.¹³³⁵

The Constitutional Court in *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others*¹³³⁶ per Jafta J set out the approach to be followed when interpreting the LRA's provisions. The LRA determines that, when interpreting one of its provisions, a person must ensure that the construction complies with the Constitution, public international law, as well as the primary objects of the LRA.¹³³⁷

When interpreting a provision contained in the LRA, the first aim is to give effect to the rights contained in s 23 of the Constitution.¹³³⁸ Labour legislation should be viewed against the backdrop of the Constitution to ensure that employers' and employees' fundamental rights are protected. Therefore, the Constitution is of central importance.¹³³⁹

If a provision is capable of two conflicting interpretations, the meaning that best accords with the Constitution should be used, unless it is clear that the Legislature intended otherwise. In *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*¹³⁴⁰ the Constitutional Court held that a construct should fall within the confines of the Constitution rather than out of its bounds, as long as such an interpretation would be reasonable.¹³⁴¹ The Constitutional Court noted in support of this premise that if legislation is enacted in order to give effect to constitutional rights, the courts are obliged to give effect to the legislative purpose.¹³⁴² A proper interpretation would be one that ensures the protection, promotion and fulfilment of constitutional

(CC) at para 4 and *Fredericks & others v MEC for Education and Training, Eastern Cape & others* 2002 (2) BCLR 113 (CC) at para 10.

¹³³⁴ Section 1(a) of the Constitution.

¹³³⁵ Section 3(b) of the LRA.

¹³³⁶ *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* [2011] ZACC 31 at 34 - 36. Although this case dealt with the interpretation of s 197 of the LRA, the court discusses the way in which provisions of the LRA should be construed in general.

¹³³⁷ Section 3(1) of the LRA. See also the objects of the legislation as set out in s 1 of the LRA.

¹³³⁸ Section 1(a) of the LRA.

¹³³⁹ *Fedlife Assurance v Wolfaardt* per Froneman AJA in his dissenting judgment at para 2.

¹³⁴⁰ *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC).

¹³⁴¹ *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* at paras 23 - 24.

¹³⁴² *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) at para 14.

rights and common law rights. The courts are also obliged to remove any conceivable deviations from the objects of the Bill of Rights that exist at common law.¹³⁴³

One of the most important consequences of the enactment of s 23 of the Constitution is that it developed the right not to be unfairly dismissed. However, it must be kept in mind that the fundamental right to fair labour practices proposes the continuation of employment relationships on terms that are fair to both employers and employees.¹³⁴⁴ Hence, in the process of interpreting the LRA, the interests of employers and employees should be balanced. Any limitation of a constitutionally protected right should be justified in accordance with s 36 of the Constitution.¹³⁴⁵ Whether a right can be limited also depends on the content of the legislative provision under scrutiny and the reason for its enactment.¹³⁴⁶

The LRA must be interpreted to give effect to its primary objects.¹³⁴⁷ If the wording of a legislative provision leads to uncertainty the Court must follow the general rules of construct. The ordinary meaning of words must be used, unless a departure from the ordinary meaning would better suit the policy behind and purpose of the particular provision.¹³⁴⁸

¹³⁴³ *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 33.

¹³⁴⁴ Section 23 of the Constitution. See also *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) at para 40.

¹³⁴⁵ Section 3(a) and (b) of the LRA. See also *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) at para 44 and *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* at paras 23 – 24.

¹³⁴⁶ In *IMATU v Rustenburg Transitional Local Council* [1999] 12 BLLR 1299 (LC) at para 17 the Labour Court for instance considered whether or not the fundamental right to freedom of association of senior managerial employees may be limited. It was held that it is impossible to exclude such employees from the operation of the Constitution. But, the court held that the particular Constitutional right itself was intrinsically limited. Section 23(1) of the Constitution contains no intrinsic limitation. Therefore dismissal protection should in principle be available to ‘everyone’.

¹³⁴⁷ Section 1(a) read with s 3(a) of the LRA. Innes CJ in *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 543 stated that every piece of legislation has a specific function which the courts must aim to give effect to.

¹³⁴⁸ *Bitumat Limited & another v Paramount Motors (Private) Limited t/a Belleview Service Station & another* [2013] JOL 30229 (ZH). See also *Nu Naks (Private) Limited v JW Jaggars Wholesalers (Private) Limited & another* [2013] JOL 30232 (ZH) at 2 & 4. Mavangira J held that when contracts are construed, words must in as far as it is reasonably practicable be afforded their normal grammatical meaning, unless doing so would lead to absurdity, repugnance or inconsistency in the context of the rest of the instrument. The ordinary meaning of words in contracts and other written instruments may only be modified to the extent in which it is necessary so as to avoid such absurdity and inconsistency.

In *NUMSA v Vetsak Cooperative*¹³⁴⁹ Smalberger J held that the courts have to employ a moral or value judgment to establish what would be fair in the particular factual circumstances. In so doing due and proper regard must be had to the purpose of the legislation. Smalberger J in *SA Breweries Ltd v Food & Allied Workers' Union*¹³⁵⁰ commented that if there is ambiguity in legislation, a construct that upholds common law rights should be used rather than one which has the effect of depriving such rights. Since the LRA was enacted to give effect to the right to fair labour practices as entrenched in the Constitution the LRA's provisions should be purposively construed.¹³⁵¹

The meaning of the constitutional rights themselves must take account of international law,¹³⁵² particularly international law that forms the basis of the legislative provisions.¹³⁵³ The LRA is intended to give effect to South Africa's international obligations as a member of the International Labour Organisation.¹³⁵⁴ The Constitution stresses the fact that every court must, when interpreting legislation, prefer an interpretation which is consistent with international law over a construct that conflicts with it.¹³⁵⁵ The court has acknowledged the importance of international law as guideline to give contents to the constitutional right to fair labour practices.¹³⁵⁶ The Conventions and Recommendations made by the ILO are of pertinence. In addition, other foreign instruments and social charters may provide guidance to the courts.

¹³⁴⁹ *NUMSA v Vetsak Cooperative* 1996 (4) SA 577 (SCA) at para 25.

¹³⁵⁰ *SA Breweries Ltd v Food & Allied Workers' Union* 1990 (1) SA 92 (A) at 99F.

¹³⁵¹ *Pharmaceutical Manufacturers Association of SA & others; in re: Ex parte application of President of the RSA & others* 2000 (2) SA 674 (CC) at para 44.

¹³⁵² Section 39(1)(b) of the Constitution.

¹³⁵³ *NEHAWU v University of Cape Town* at para 34 determines that the concept must be left to gather meaning from the decisions of the Labour Court and the Labour Appeal Court and other specialist institutions. 'These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience.' See also *SA National Defence Union v Minister of Defence & others* 1999 (4) SA 469 (CC) at para 25 where O'Reagan J refers to the Conventions of the International Labour Organisation as an important source of international law in interpreting s 23 of the Constitution. This was subsequently confirmed by the Constitutional Court in *NUMSA & others v Bader Bop* at para 28 and *Equity Aviation Services (Pty) Ltd v CCMA & others* at para 26.

¹³⁵⁴ Section 1(b) of the LRA.

¹³⁵⁵ Section 233 of the Constitution.

¹³⁵⁶ *NEHAWU v University of Cape Town & others* 2003 (3) SA 1 (CC) at 19.

The court in *Chagi & others v Special Investigating Unit*¹³⁵⁷ found that if there are two possible constructs that can be given to a particular provision and both are reasonable, a court must interpret the provision in a way that is consistent with the Constitution. If one of the possible interpretations would result in unconstitutionality, the interpretation becomes a constitutional issue if the other interpretation would result in the legislative provision being constitutional.¹³⁵⁸

The purpose of the particular provision should also be scrutinised in the context of the legislation.¹³⁵⁹ When interpreting the LRA, the court should give effect to all the words.¹³⁶⁰ Words should not be singled out and given isolated literal meanings.¹³⁶¹ The context in which a particular provision appears in the LRA should be considered at all times.¹³⁶²

Words should not be provided with meanings that they cannot reasonably be interpreted to have. In *S v Zuma & others*¹³⁶³ the Constitutional Court advised against an interpretation of the legislation to say 'whatever we might wish it to mean.' In *South African Police Service v Public Servants Association*¹³⁶⁴ Sachs J considered the interpretative exercise to achieve constitutional alignment. It was held that this exercise would not necessitate the distortion of words to the extent that they are afforded meanings that they could not reasonably have. However, it requires interpreting the words in such a way as to promote compliance with the Constitution. This involves taking into account the socio-economic context and the purpose of the provision. Furthermore, the context of the particular problem requiring a solution should be considered. Therefore, the LRA must be 'interpreted purposively to give effect to an expeditious resolution of labour disputes.'¹³⁶⁵

¹³⁵⁷ *Chagi & others v Special Investigating Unit* 2009 (2) SA 1 (CC). In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* 2009 (1) SA 337 (CC) at paras 46 - 47 Kroon AJ confirmed the appropriateness of effecting the most constitutionally correct construct.

¹³⁵⁸ *Chagi & others v Special Investigating Unit* at para 14.

¹³⁵⁹ Section 1 of the LRA. See also *NEHAWU v University of Cape Town & others* at paras 33 – 40 and *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* at paras 36 - 37.

¹³⁶⁰ *Bracks NO & another v Rand Water & another* (2010) 31 ILJ 897 (LAC) at para 5.

¹³⁶¹ *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* at para 54.

¹³⁶² *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* at para 55.

¹³⁶³ *S v Zuma & others* 1995 (2) SA 642 (CC) at paras 17 – 18.

¹³⁶⁴ *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 20.

¹³⁶⁵ *Bracks NO & another v Rand Water & another* at para 11.

5.2 Interpretation of s 186(1)(b) of the LRA

When interpreting s 186(1)(b) of the LRA, effect firstly has to be given to the fundamental right to fair labour practices. In addition other constitutional rights that may be affected, such as the right to equality and dignity and the right to refer a dispute for resolution may be of particular pertinence.¹³⁶⁶ Secondly, the object and context of s 186(1)(b) of the LRA must be considered. Regard must be had also to the declared purpose of the LRA to promote economic development, social justice and labour peace.

Section 186(1)(b) is situated in Chapter VIII of the LRA. This entire chapter is specifically aimed at protecting workers against unfair termination of their contracts of employment. Therefore, the object of the particular provision is to promote job security by preventing the unfair practice of keeping an employee in a temporary position without the security afforded to a permanent employee.¹³⁶⁷ However, this aim goes further than the simple suppression of an exploitative practice of indefinite renewals. It is intended to give effect to the fundamental rights to equal and fair treatment. It is in main aimed at ensuring compliance with the constitutionally mandated obligation not to dismiss an employee unfairly.¹³⁶⁸ The right to protection against unfair dismissal is recognised as a core component of the fundamental right to fair labour practices.¹³⁶⁹

Section 186(1)(b) of the LRA is aimed at addressing abuse of fixed term contracts in circumstances that better suit indefinite appointment. Fixed term employees cannot be appointed continuously on fixed term contracts on contractual terms that are relatively poorer and which can be brought to an abrupt end without a fair reason.¹³⁷⁰ Employers are also, by the enactment of this provision, prevented from abusing freedom to contract in order to avoid their labour law obligations.¹³⁷¹

¹³⁶⁶ See *Chagi & others v Special Investigating Unit* at para 14.

¹³⁶⁷ In *Dierks v University of South Africa* at paras 143 – 144 it was held that the ‘reason for the provision is founded to a large extent on the patent unfairness of the indefinite renewals of fixed term contracts.’ See also *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC) at 1961A - B.

¹³⁶⁸ *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) at paras 14, 16 & 34 – 35. See also *Schutte & others v Powerplus Performance (Pty) Ltd & another* 1999 (20) ILJ (LC) at paras 24 - 25.

¹³⁶⁹ Bhorat & Cheadle ‘Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions’ DPRU University of Cape Town 2010 at 6.

¹³⁷⁰ This purpose is evident from ILO Convention No. 158 on which the unfair dismissal provisions are based.

¹³⁷¹ *Seforo and Brinant Security Services* (2006) 27 ILJ 855 (CCMA) at para 860B - C.

It is evident from the wording and structure of Chapter VIII that it is based on the ILO Convention No. 158 of 1982 on Termination of Employment. This Convention has been used by the courts to assist in the interpretation of national legislation.¹³⁷²

It is evident that it is inappropriate to use dissemination of s 186(1)(b) of the LRA as method of construct. The Constitutional Court has cautioned against singling out certain words and dissemination of the LRA's provisions when interpreting them.¹³⁷³ But, in a number of decisions this advice was not followed and particular attention was paid and importance placed on specific words and terms contained in s 186(1)(b) of the LRA. This has resulted in various different interpretations based on two main schools of thought: those who consider the scope of application wide enough to include an expectation of permanent appointment and those who do not. The different interpretations given to particular words in the provision are elaborated upon briefly below.

5.2.1 A narrow, literal approach to interpretation

It is obvious that where the court uses dissemination of a provision as method of interpretation, a closer link to the specific wording of a provision would be evident. The Constitutional Court indicated that this is not the way in which the LRA should be interpreted. Perhaps due to the problems experienced as a result of the ambiguity of s 186(1)(b) of the LRA, this provision has been analysed in order to ascertain its scope of application. In an attempt to keep to the chronology of the developments in the courts, the literal approach will be discussed first.

¹³⁷² Gericke 'A New Look at the Old Problem of a Reasonable Expectation: the Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment' at 13 - 14. See also Van Niekerk A, Christianson MA, McGregor M et al *Law @ Work* (2008) 205 – 206. Convention No. 158 of 1982 on Termination of Employment is frequently used by South African as an aide to the interpretation of the unfair dismissal provisions in the LRA. See for example *Irvin & Johnson Ltd v CCMA* (2006) 27 ILJ 935 (LAC) at paras 21 – 22; *Modise & others v Steve's Spar, Blackheath* (2000) 21 ILJ 519 (LAC) at para 30; *Karras t/a Floraline Clothing v SA Scooter and Transport Allied Workers Union & others* (2000) 21 ILJ 2612 (LAC) at para 26. *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC) at 1646.

¹³⁷³ *Aviation Union of South Africa & another and South African Airways (Pty) Ltd & others* at para 54.

5.2.1.1 *Dierks v University of South Africa*¹³⁷⁴

This decision is probably the most important and most popularly referred to decision regarding reasonable expectation of renewal of a fixed term employment contract. This case was decided after the enactment of the final Constitution. Even though the decision was often criticised in later years, many presiding officers followed the narrow, literal approach of the decision. A detailed discussion of the facts and the judge's reasoning in making this decision is warranted.

Since presiding officers often connect their findings to specific facts, a brief summary of the salient facts in this matter are provided.

In the *Dierks*-case, a fixed term employee referred a claim based on an alleged unfair dismissal for operational reasons. He claimed that the employer had created a reasonable expectation of permanent employment or that his temporary employment would at the very least continue for the time in which the person he had been filling in for was absent. He based his claim of an expectation of permanent appointment on a report which indicated that temporary academic employees were to be interviewed if permanent positions were available in the departments and either appointed permanently, or dismissed. The report also indicated that employees listed, should only be reappointed temporarily in exceptional circumstances.¹³⁷⁵

The fixed term employee argued that, because certain people, albeit in different departments in the university, whose names also appeared on the list in the report had been appointed permanently, it was the employer's appointment policy.¹³⁷⁶ It was further contended that it made no sense to exclude the possibility of permanent employment in terms of s 186(1)(b) of the LRA.¹³⁷⁷ The dispute between the employer and the fixed term employee was whether a reasonable expectation had been created by the employer that the final fixed term contract¹³⁷⁸ would be renewed, or that the fixed term employee would be offered a permanent position.

¹³⁷⁴ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC).

¹³⁷⁵ *Dierks v University of South Africa* at 1250F.

¹³⁷⁶ *Dierks v University of South Africa* at 1252C – E.

¹³⁷⁷ *Dierks v University of South Africa* at 1247C – F.

¹³⁷⁸ Although fixed term contracts were previously entered into between the parties, Oosthuizen AJ considered only the 1997 contract in terms of which the fixed term employee was last appointed, relevant. *Dierks v University of South Africa* at 1245G.

The LC held, based on the facts of this particular matter, that there was no vacancy.¹³⁷⁹ Therefore, according to the court, the employer in terms of its policy was under no obligation to invite the fixed term employee to attend an interview.¹³⁸⁰ Furthermore, it was not the view of the court that an expectation of continuance of employment was created through the employer's conduct by publication of the report.¹³⁸¹ The final fixed term contract concluded between the parties clearly recorded that the employment would expire at the end of the period indicated therein.¹³⁸²

But, the court did not leave it there. Oosthuizen AJ continued to dissect s 186(b) (now s 186(1)(b) of the LRA) in an attempt to define the scope of its application. He described the concept 'reasonable expectation' as a measure to ensure relief where no remedy is afforded under the strict principles of the law. Oosthuizen AJ agreed with Prof. Marius Olivier that the LRA envisages a substantive expectation relating to the renewal of a fixed term contract.¹³⁸³ The LC ruled that fixed term employees having an expectation of permanent appointment, should be afforded appropriate relief by virtue of their legitimate expectation, especially in the absence of other remedies in the LRA.¹³⁸⁴

The court acknowledged that:

Prima facie, it does seem logical that if a reasonable expectation can lead to a renewal of a fixed term contract, the same expectation should lead to appropriate relief for permanent employment by implication particularly if there is no provision in the Act to address the apparent lacuna.¹³⁸⁵

Even this court acknowledged that it makes no logical sense to limit the expectation of renewal to one for another fixed term if the surrounding circumstances evidence a reasonable expectation of indefinite renewal or permanent appointment. Section 186(1)(b) of the LRA requires that the fixed term contract not be renewed or if it is renewed, be renewed on terms that are less favourable in instances where the fixed term employee reasonably expected the fixed term contract to be extended on the same

¹³⁷⁹ *Dierks v University of South Africa* at 1251A – D.

¹³⁸⁰ *Dierks v University of South Africa* at 1249E.

¹³⁸¹ *Dierks v University of South Africa* at 1249J and 1252J.

¹³⁸² *Dierks v University of South Africa* at 1250A – C.

¹³⁸³ Olivier 'Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments' at 1006 & 1028.

¹³⁸⁴ *Dierks v University of South Africa* at 1247F.

¹³⁸⁵ *Dierks v University of South Africa* at para 141.

or better terms. Grogan declares that there seems to be no reason in logic or law why the provision should not apply when a fixed term employee can prove a reasonable expectation of permanent appointment. In his view it would be excessively technical to presume that the Legislature intended only the term of the contract when it included 'same or similar terms' in the provision.¹³⁸⁶

Nevertheless, the court held that legitimate expectation, as it is contained in s 186(1)(b) of the LRA, should be confined to cases where there have been prior renewals of a fixed term contract. In the court's view, the employee *in casu* would have been appointed after succeeding in an interview. Therefore, it would not have qualified as a 'renewal' of the fixed term contract as required in terms of the provision.¹³⁸⁷

The court considered the 'residual unfair labour practices'-item¹³⁸⁸ to be a sufficient remedy for a fixed term employee who claim based on an expectation of permanent employment.¹³⁸⁹ But, that item only provided remedies against unfair discrimination, unfair conduct related to promotion, demotion or training, and the failure to re-instate in terms of an agreement. It was replaced by s 186(2) of the current LRA. This new provision also does not provide a remedy for the failure to offer a fixed term employee indefinite employment if he or she had a reasonable expectation to be so appointed.

The Judge expressed his uncertainty regarding this finding regarding the scope of application of s 186(1)(b) by qualifying the judgment by attaching it to particular facts. Oosthuizen AJ, in so many words, stated that if he was wrong in concluding that the LRA does not apply to a reasonable expectation of permanent employment, the particular facts of the matter in any event exclude a finding that such an expectation had been created.¹³⁹⁰

¹³⁸⁶ Grogan *Workplace Law* (2009) at 150.

¹³⁸⁷ *Dierks v University of South Africa* at para 149.

¹³⁸⁸ Item 2 of Sch 7 (Part B) to the LRA 28 of 1956.

¹³⁸⁹ *Dierks v University of South Africa* at 1247J and 1248A – F.

¹³⁹⁰ *Dierks v University of South Africa* at 1253B. Olivier 'Legal Restraints on the Termination of Fixed-term Contracts of Employment: An Enquiry into Recent Development' 1007. See also *SA Rugby (Pty) Ltd v CCMA & others* (1999) 20 ILJ 1227 (LC) at para 149 as well as *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1042 (LC) at para 25. See also *NUMSA obo Nkosi & another and Packspec* (2011) 32 ILJ 1263 (BCA) and *Swart v Department of Justice* (2003) 24 ILJ 1049 (BCA) in which the narrow, literal construct of s 186(1)(b) of the LRA as followed in *Dierks* was preferred.

The reasons advanced in *Dierks* for upholding a literal interpretation instead of one which is logical are clearly mistaken. Therefore, this case is in actual fact authority for a purposive interpretation of s 186(1)(b) of the LRA.¹³⁹¹

5.2.1.2 *SA Rugby (Pty) Ltd v CCMA & others*¹³⁹²

Another case concerning dismissal of fixed term employees in which the court used dissemination of the dismissal provision as means of construct and consequently interpreted the provision restrictively, is *SA Rugby (Pty) Ltd v CCMA & others*.¹³⁹³ In this matter the court held that s 186(1)(b) of the LRA expressly requires that the employee must have a reasonable expectation that his or her fixed term contract would be renewed. The court consequently held that the expectation would have to have been an expectation of renewal of the fixed term contract in question, 'i.e. the said three month contract on the same or similar terms, not an expectation of another contract for a period of one year and for different purposes.'¹³⁹⁴ It is clear that the court, in this case, focussed on the meaning of 'renewal' and neglected to consider what the Legislature intended by including the words 'on the same or similar terms'.

The inclusion of the term 'renewal' in s 186(1)(b) of the LRA is aimed at providing some flexibility in the application of the provision.¹³⁹⁵ In the context of rugby players, this decision cannot be faulted. However, the suitability of this case as precedent in general support of a literal interpretation of s 186(1)(b) of the LRA, excluding the possibility of claiming an indefinite appointment is questionable. It can hardly be argued that a rugby player can expect to be appointed for more than a season or, in leniency, a year at a time. On the other hand, where the nature of the work is better suited to permanent employment, the situation may be different. Grogan aptly explains that whereas actions may in certain circumstances be justified, depending on the facts of the particular matter, it may in other cases be patently unfair.¹³⁹⁶

¹³⁹¹ Credit to Halton Cheadle and Adam Pickering for the crisp formulation of this argument in the Third Respondent's Heads of Argument in *University of Pretoria v CCMA and others* (LAC).

¹³⁹² *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC).

¹³⁹³ *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC).

¹³⁹⁴ *SA Rugby (Pty) Ltd v CCMA & others* at para 25. See also *NEHAWU obo Tati and SA Local Government Association* (2008) 29 ILJ 1777 (CCMA) at 1783 where this view was also supported.

¹³⁹⁵ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1023.

5.2.2 A purposive construct

There have been cases after *Dierks v University of South Africa*¹³⁹⁷ where a purposive construct was preferred over a narrow literal interpretation. In the cases that are briefly discussed below, the courts acknowledged that logically a fixed term employee with a reasonable expectation of indefinite employment should be covered by s 186(1)(b) of the LRA.

5.2.2.1 *University of Cape Town v Auf der Heyde*¹³⁹⁸

In this case, the LAC surmised that s 186(1)(b) of the LRA should be capable of application where a reasonable expectation of permanent appointment existed.¹³⁹⁹ However, the court felt that in the light of the facts of that matter it was unnecessary to settle the matter. Unlike the *Dierks* decision, the matter of pinning down the scope of application of s 186(1)(b) was not pursued any further. In this case the fixed term employee's main claim was that he had an expectation of a renewal for a further five years which was the original term of his fixed term contract. The court's obiter finding that s 186(1)(b) of the LRA should apply to instances where a reasonable expectation of indefinite employment is claimed, can be regarded as an acknowledgement of the legal uncertainty on this aspect at the time and doubt as to the correctness of the decision in *Dierks v University of South Africa*. Due to the fact that this was a Labour Appeal Court decision, whereas the *Dierks*-case was decided in the Labour Court, this finding opened the door for other courts to deviate from the decision in *Dierks*.¹⁴⁰⁰ This was exactly what happened in *McInnes v Technikon Natal* that is discussed below.

¹³⁹⁶ Grogan *Employment Rights* (2010) at 97.

¹³⁹⁷ Olivier 'Legal Restraints on the Termination of Fixed-term Contracts of Employment: An Enquiry into Recent Development' 1007. See also *SA Rugby (Pty) Ltd v CCMA & others* (1999) 20 ILJ 1227 (LC) at para 149 as well as *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1042 (LC) at para 25. See also *NUMSA obo Nkosi & another and Packspec* (2011) 32 ILJ 1263 (BCA) and *Swart v Department of Justice* (2003) 24 ILJ 1049 (BCA) in which the narrow, literal construct of s 186(1)(b) of the LRA as followed in *Dierks* was preferred.

¹³⁹⁸ *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC).

¹³⁹⁹ *University of Cape Town v Auf der Heyde* at para 20.

¹⁴⁰⁰ This case is discussed above under 5.2.1.1.

5.2.2.2 *Mclnnes v Technikon Natal*¹⁴⁰¹

Penzhorn AJ, in this case, decided that the conclusion reached by Oosthuizen AJ in *Dierks v University of South Africa* with regards to the ambit of s 186(1)(b) of the LRA was wrong. The Labour Court noted that the focus should not be on the form of the next contract, but rather on the failure to continue employment, in other words the reasonableness of not renewing the contract instead of the meaning of the word 'renewal'.¹⁴⁰²

5.2.2.3 *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*¹⁴⁰³

The view expressed in *Mclnnes v Technikon Natal* was endorsed in *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*.¹⁴⁰⁴ The approach adopted was that a reasonable expectation of an indefinite contract constituted a renewal of the contract on 'similar terms.' In this case the nature of the expectation and the reasonableness of such an expectation were held to be the primary considerations in establishing whether or not a fixed term employee had been dismissed. Further, it was held that, in the court's view, the Legislature could not have intended to limit the remedy in terms of s 186(1)(b) of the LRA to instances where someone expected a temporary renewal and to exclude the possibility of claiming based on an expectation of permanent employment, since it makes no sense in the light of the purpose of the provision.¹⁴⁰⁵

These cases show a clear progression towards a purposive construct. Unfortunately, the latter decisions were decided in the Labour Court. *Auf der Heyde*¹⁴⁰⁶ was decided in the Labour Appeal Court. The possibility of including fixed term employees expecting permanent appointment under the protective scope of s 186(1)(b) of the LRA was not conclusively brought to finality in that case since the court's remark was only made in passing. Despite the finding in *Mclnnes*¹⁴⁰⁷ above, the effect of the *Dierks*-decision¹⁴⁰⁸

¹⁴⁰¹ *Mclnnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

¹⁴⁰² *Mclnnes v Technikon Natal* at paras 20 - 21.

¹⁴⁰³ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC).

¹⁴⁰⁴ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at para 18. See also *Malandoh v SA Broadcasting Corporation* (1997) 18 ILJ 544 at 547D - E.

¹⁴⁰⁵ *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* at para 30.

¹⁴⁰⁶ *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC). See the discussion of this case under 5.2.2.1 above.

¹⁴⁰⁷ *Mclnnes v Technikon Natal* is discussed in 5.2.2.2 above.

was evident as late as 2011. In November of that year, Davies J finally declared the remedy provided in terms of s 186(1)(b) of the LRA unavailable to fixed term employees having an expectation of more than temporary renewal of their fixed term contracts.

5.2.2.4 *Geldenhuis and University of Pretoria*¹⁴⁰⁹

A very important case was once again referred to the CCMA in 2008. This case is important in that it progressed from the CCMA all the way up to the Labour Appeal Court. In November of 2011, judgment was handed down in the appeal of this matter. The ultimate negative effect of the judgment that was handed down in this case on the rights of fixed term employees, renders it sufficiently important to also discuss the facts of this matter briefly.

In *Geldenhuis and University of Pretoria*¹⁴¹⁰ the fixed term employee's contract was renewed seven times over a period of four years. The employer advertised permanent vacancies for positions entailing the same work as that which the fixed term employee had previously been performing. The fixed term employee applied for the advertised permanent positions and was invited to attend an interview. Despite meeting all the advertised requirements, she was informed that her application for permanent appointment had been unsuccessful. Instead, she was offered a further six month fixed term contract. It was made very clear to her that this contract would be a final non-renewable six month contract. The fixed term employee rejected the offer of temporary renewal of her fixed term contract, claiming that she had a reasonable expectation of permanent employment.

During the arbitration proceedings, the employer raised a point *in limine* claiming that the CCMA lacked jurisdiction to entertain the dispute since s 186(1)(b) of the LRA did not cover the situation where an employee claimed to have a reasonable expectation of permanent appointment. For purposes of the arbitration, the employer was unwilling to concede that the employee did in fact harbour a reasonable expectation of permanent employment. The arbitrator rejected the employer's assertion that s 186(1)(b) of the LRA was unavailable to fixed term employees who reasonably expect permanent

¹⁴⁰⁸ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC). See the discussion in 5.2.1.1 above.

¹⁴⁰⁹ *Geldenhuis and University of Pretoria* (2008) 29 ILJ 1772 (CCMA).

¹⁴¹⁰ *Geldenhuis and University of Pretoria* (2008) 29 ILJ 1772 (CCMA).

employment. The arbitrator concluded that it is illogical to deny employees the right to take to task employers who create an expectation of permanent appointment, but then fails to do so. It was held that it was not the Legislature's intention to limit the application of s 186(1)(b) only to an expectation of renewal of a fixed term contract on exactly the same terms. Therefore, the commissioner preferred a purposive interpretation of the LRA.

The fact that the employee had been offered another six month contract did not, in the commissioner's view, necessarily imply that no dismissal could have occurred. Instead, he opined that the nature of the expectation that was created by the employer and the substance of the subsequent claim (whether it is based on a reasonable expectation of renewal on the same terms, or on similar terms) and the merits of the claim would determine whether or not a dismissal had in fact occurred.¹⁴¹¹

5.2.2.5 *University of Pretoria v CCMA & others*¹⁴¹²

On review, the Labour Court agreed with the arbitrator's interpretation. Nyathela AJ held that the LRA as a piece of social legislation, should be interpreted liberally and purposively to attain fairness in the workplace. Consequently, both the application for a declaratory order that the fixed term employee could not have been dismissed in terms of s 186(1)(b) of the LRA as well as the review application were dismissed.¹⁴¹³ Nevertheless, leave to appeal against this decision was granted based on the fact that the courts have entertained different views on the issue of the nature of expectation that a fixed term employee is required to have.

This matter was then taken on appeal where the judge had a very different view. This is discussed briefly below.

¹⁴¹¹ *Geldenhuis and University of Pretoria* at para 20.

¹⁴¹² *University of Pretoria v CCMA & others* LC Case no. JA 38/10 (Unreported).

¹⁴¹³ *University of Pretoria v CCMA & others* (LC) at paras 28 – 31, 37 & 43.

5.3 *University of Pretoria v CCMA & others*¹⁴¹⁴

The appeal against the decision in *Geldenhuis and University of Pretoria*¹⁴¹⁵ succeeded. The Labour Appeal Court, guided by the decision in *Dierks*¹⁴¹⁶ followed a narrow, literal interpretation of s 186(1)(b) of the LRA. Davies J surmised that, on the clear wording of s 186(1)(b) of the LRA interpreted literally, the Legislature could not have intended a change of the contractual terms to transgress beyond the fixed term originally agreed upon. At best it can provide a remedy to a fixed term employee whose contract had not been renewed on the same terms.

When measuring the method of construct used by the court when reading the reported decision against the prescriptions that have been laid down by the Constitutional Court, it becomes very apparent that there are some major discrepancies.

The LAC failed to consider and implement the constitutional dimension of the issue. In order to preserve the integrity of the LRA as a piece of legislation which was enacted with the specific purpose of giving effect to s 23 of the Constitution, it is imperative that the fundamental rights and values provided for in the Constitution be conserved and promoted.

The conclusion that was reached in this matter to the effect that s 186(1)(b) of the LRA should be narrowly and literally construed so as to exclude certain employees from its protection, does not take sufficient account of the important interest that all workers have in job security. The court declared the remedy provided in s 186(1)(b) of the LRA unavailable to certain fixed term employees, despite the fact that no alternative remedy exists for these employees.

In effect, this decision practically excludes the protection against unfair dismissal as envisaged in the LRA. As this decision clearly limits the constitutional rights of a certain group of fixed term employees, the court should have indicated why it is necessary and justified in terms of the limitation clause.¹⁴¹⁷ No reasons were advanced by the court and s 36 of the Constitution was not applied. This construct of s 186(1)(b) has the effect

¹⁴¹⁴ *University of Pretoria v CCMA & others* [2011] ZALAC 25.

¹⁴¹⁵ *Geldenhuis and University of Pretoria* (2008) 29 ILJ 1772 (CCMA) is discussed under 5.2.2.4 above.

¹⁴¹⁶ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) is discussed in 5.2.1.1 above.

¹⁴¹⁷ As mentioned under 1.8 in Ch 1, the rights guaranteed in the Bill of Rights (in this case the right to fair labour practices) may only be limited in terms of s 36 of the Constitution.

of limiting the class of employees who may rely on the unfair dismissal protection. This narrow interpretation contrasts both the objects of the LRA and the Constitution.¹⁴¹⁸

If the scope and objects of the provision is found to lead to injustice if strictly applied, the court should have no discretion to exclude an employee from the protection provided. A broad and purposive approach would not only provide protection to vulnerable employees, but also deter exploitative treatment of employees contrary to labour law and the erosion of dignity as warranted by the Constitution.¹⁴¹⁹

The reason that Davies AJ provides for this decision, is that the wording of s 186(1)(b) of the LRA expressly excludes the possibility of an expectation of indefinite employment. However, in looking at the contrasting decisions discussed above,¹⁴²⁰ it seems that this court was the only one that had complete certainty regarding this aspect.

I disagree with the view of the LAC that the wording of s 186(1)(b) of the LRA as it stands, excludes the possibility of a claim based on a reasonable expectation of permanent appointment. Even on a literal interpretation, I submit that it is not inconceivable that the Legislature intended including fixed term employees with an expectation of indefinite employment.

According to Black's Law Dictionary,¹⁴²¹ 'renewal' can mean the 'recreation of a legal relationship or the replacement of an old contract with a new contract, as opposed to a mere extension of a previous relationship or contract'. In other words, even on a literal interpretation, 'renewal' can mean resurrection of a contractual relationship on terms which may not be exactly the same. In *Commercial Workers Union of SA v Tao Ying Metal Industries & others*¹⁴²² 're-enactment', 'amendment' and 'extension' were equated to 'renewal'. Renewal is used in the same sense in *McInnes v Technikon Natal*¹⁴²³ and in *Vorster v Rednave Enterprises (Pty) Ltd*.¹⁴²⁴

¹⁴¹⁸ Vettori 'Fixed Term Employment Contracts: The Permanence of Temporary' at 208.

¹⁴¹⁹ Section 10 of the Constitution and the right to dignity is discussed in Ch 1 under 1.4.

¹⁴²⁰ See the discussion under 5.2.2.2 above.

¹⁴²¹ The Law Dictionary 'Black's Law Dictionary Free Online Legal Dictionary' 2nd edn accessed at <http://thelawdictionary.org/> (22 March 2013).

¹⁴²² *CUSA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) at paras 92 - 93.

¹⁴²³ *McInnes v Technikon Natal* at paras 20 – 21. This case is discussed above under 5.2.2.2.

¹⁴²⁴ *Vorster v Rednave Enterprises (Pty) Ltd* at para 20. See also the discussion under 5.2.2.3 above.

If a fixed term employee applies for a permanent position it could be argued that any subsequent appointment does not qualify as a renewal of the fixed term contract since the appointment is made by virtue of a successful application for a post. But, even upon a literal construct of s 186(1)(b) of the LRA there is an apparent link between the renewal of the contract and the terms of the renewed contract, i.e. the regenerated contract must be ‘*on the same or similar terms.*’ The inclusion of ‘or similar’ implies that the renewal need not necessarily be made on precisely the same terms.

Another view is that the term ‘same or similar terms’ excludes the possibility of renewal of a fixed term contract on improved terms. In *Tshabalala and North-West University*¹⁴²⁵ it was for instance decided that this term could not be interpreted to mean that an expectation of renewal could include an appointment to a more senior position. The renewed contract must also not be for a different term or for a different purpose.¹⁴²⁶

It is in my opinion plausible that ‘similar terms’ could refer to other aspects of the contract. If for instance a fixed term employee’s job is replaced by a permanent position rendering the fixed term employee redundant, it cannot logically be argued that the permanent post is not at least ‘similar’ to the position the fixed term employee previously filled. I agree with Prof Vettori and Grogan that the inclusion of ‘similar terms’ is capable of interpretation as referring to the nature of the employment and not only to the period of the appointment. To attach a different meaning to the words would be overly technical.¹⁴²⁷

The court in *University of Pretoria v CCMA & others*,¹⁴²⁸ held that the proposed amendments to the LRA which would extend s 186(1)(b) of the LRA so as to also provide protection to fixed term employees if they expect permanent appointment, was a clear indication of the fact that original provision was not intended to cover these employees. This contention in my view should not have influenced the judges’ decision. The Legislature, through the inclusion of the provision pertaining to indefinite renewal in the Labour Relations Amendment Bill of 2012, only sought to bring finality on an aspect

¹⁴²⁵ *Tshabalala and North-West University* (2007) 28 ILJ 1204 (CCMA) at para 40.

¹⁴²⁶ *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC) at para 25.

¹⁴²⁷ Vettori ‘Fixed term employment contracts: The Permanence of Temporary’ 206 –208. See also Grogan *Workplace Law* (2009) at 150.

¹⁴²⁸ *University of Pretoria v CCMA & others* [2011] ZALAC 25.

of the law on which the courts could not conclusively agree.¹⁴²⁹ When the matter was initially heard and even at the time of writing, the proposed amendments had not been conceived. In addition, the result of the negative outcome in the Labour Appeal Court brought an end to the particular matter without considering the merits of the dispute.

This unfortunate decision is similar to the English decision in *Booth v United States of America*¹⁴³⁰ in which Morrison J decided that Parliament makes the rules as to whether or not employees enjoy statutory protection. In this case it was decided that, if it is lawfully possible for an employer to evade its statutory obligations, the courts would not be able to interfere since the courts only apply the law and it is up to the legislature to ensure that no loopholes exist.¹⁴³¹ Such a *dictum* that observes that the task of a judge is only to apply the law without considering the purpose of the legislative provision is contrary to the spirit of the Constitution and hence of South African law.¹⁴³²

The views of the Labour Court and the Labour Appeal Court regarding interpretation of s 186(1)(b) of the LRA indicated a clear progression towards a purposive interpretation effectively broadening the scope of protection offered by it.¹⁴³³ But, the interpretation that is currently followed fails to underscore the principles of equality¹⁴³⁴ and the right to fair labour practices.¹⁴³⁵ In addition, it does not account properly for the right to job security of fixed term employees. The judgment in *University of Pretoria* fails to indicate why these previous decisions were wrong, but instead relies on the decision in *Dierks* which was patently flawed.

The narrow interpretation that was followed in *Dierks* and subsequently in the Labour Appeal Court in *University of Pretoria v CCMA & others*¹⁴³⁶ has the effect that it is impossible to claim based on an expectation of permanent appointment. This means that a fixed term employee who only reasonably expected to have a contract renewed say for three or six months would enjoy more protection in terms of the LRA than one

¹⁴²⁹ This purpose is expressed in the Memorandum of Objects Labour Relations Amendment Bill, 2012 at 1(e).

¹⁴³⁰ *Booth v United States of America* 1998 WL1043238.

¹⁴³¹ *Booth v United States of America* at 3.

¹⁴³² See the minority judgment in *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman NO* 1997 (4) SA 302 (A) at 320 B where Olivier AJ states that such an approach contradicts the spirit of South African law and is incapable of catering for the needs of society.

¹⁴³³ See the discussion of *Auf der Heyde*, *McInnes* and *Vorster* in 5.2.2.2 above.

¹⁴³⁴ Section 9 of the Constitution.

¹⁴³⁵ Section 23 of the Constitution.

¹⁴³⁶ *University of Pretoria v CCMA & others* [2011] ZALAC 25.

who had a legitimate expectation of permanent appointment. As the Constitutional Court has declared, there is a wider public dimension in matters which deal with Constitutional rights. The court should have considered the interest of all the fixed term employees that could be affected, and not only the individual litigant involved in the matter.¹⁴³⁷

Section 23 of the Constitution guarantees fair labour practices to 'everyone'. This means that 'all the people in the country' have this right.¹⁴³⁸ If criminals and persons guilty of illegal activities are held to be covered by our Constitution,¹⁴³⁹ there seems to be no reason to deny someone who, instead of having just an expectation of renewal on a temporary basis, has a reasonable expectation of permanent appointment, the right to not be unfairly dismissed.¹⁴⁴⁰

5.4 The doctrine of precedent

The approach followed in South Africa and by other common law jurisdictions such as England, Australia and the US is that the *stare decisis*-doctrine or the doctrine of precedent, is applied.¹⁴⁴¹ This means that the courts are bound to previous decisions despite the fact that they may no longer be appropriate.¹⁴⁴² The Labour Court should not depart from its own decisions unless it is satisfied that they are clearly wrong. Whether or not it is possible for a lower court to deviate from a precedent set by a higher court was addressed in *True Motives 84 (Pty) Ltd v Mahdi*.¹⁴⁴³ The Supreme Court of Appeal per Jafta AJ held that despite the fact that a finding was considered to have been incorrect in law, a lower court would remain bound by the decisions of the higher court.¹⁴⁴⁴ Cameron JA, in a separate judgment, indicated that lower courts and

¹⁴³⁷ See for instance *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 82 and *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at paras 42 – 43.

¹⁴³⁸ Section 7(1) of the Constitution. See also *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC) at para 111.

¹⁴³⁹ See for instance *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) at 1489 and '*Kylie*' v *CCMA & others* (2010) 31 ILJ 1600 (LAC) at paras 16 & 22.

¹⁴⁴⁰ See Grogan *Workplace Law* (2009) at 150 and Vettori 'Fixed Term Employment Contracts: The Permanence of Temporary' 207 – 208. See also *Malandoh v SABC* (1997) 18 ILJ 544 (LC) at 547D - E.

¹⁴⁴¹ In *Bloemfontein Town Council v Richter* 1938 AD 195 at 232 the *stare decisis* doctrine is described as the ordinary rule in terms of which a court is bound to its own decisions in the absence of a manifest misunderstanding or a palpable mistake. A court has no right to deviate from previous decisions since it would lead to confusion and uncertainty.

¹⁴⁴² See the introduction to Ch 2 of Vettori *The Employment Contract and the Changed World of Work* (2007).

¹⁴⁴³ *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA).

¹⁴⁴⁴ *True Motives 84 (Pty) Ltd v Mahdi* at para 80.

courts of equal status are only required to follow a previous decision to the extent in which the findings were not mentioned in passing.¹⁴⁴⁵

5.5 The need for statutory intervention

If, according to international practice, South Africa's labour arena is over-regulated, or if it already complies with the standards laid down in international law and practice, the question should be posed whether there is a need to regulate fixed term employment.

Cheadle argues that if there is already a remedy available in terms of the common law of contract, it is unnecessary to provide legislative protection as well.¹⁴⁴⁶ This may be correct in principle. However, with cases like *SA Maritime Safety v McKenzie*¹⁴⁴⁷ as precedent, it is very dangerous to assume that a fixed term employee, or any employee for that matter, will be in a position to claim relief in terms of the law of contract. The inadequacy of the common law is acknowledged by the Constitution. Legislative intervention is essential to address the imbalances in the South African labour market.¹⁴⁴⁸ It would be equally unfair to suggest that since the remedy in terms of s 23 of the Constitution remains available to fixed term employees who are not covered by the labour legislation, there is no need to further regulate them. The constitutional remedies are to a large extent reserved for employees who are able to afford to access them. Employees who are required to pay a fee that they cannot afford are being denied their right to have their disputes heard, which would be contrary to the aim of the LRA to provide access to social justice.

Since the Labour Court is required to follow the decisions of the Labour Appeal Court,¹⁴⁴⁹ the decision in *University of Pretoria v CCMA & others*¹⁴⁵⁰ will continue to have a negative effect on fixed term employees who have a reasonable expectation of

¹⁴⁴⁵ *True Motives 84 (Pty) Ltd v Mahdi* at para 101.

¹⁴⁴⁶ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 41.

¹⁴⁴⁷ *SA Maritime Safety v McKenzie* (2010) 31 ILJ 529 (SCA).

¹⁴⁴⁸ Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' (2007) at 5. Vettori *The Employment Contract and the Changed World of Work* (2007) at 17.

¹⁴⁴⁹ See the discussion in 5.4 above in this regard.

¹⁴⁵⁰ See the discussion of this decision under 5.3 above.

permanent appointment instead of just temporary renewal. Hopefully this will be resolved when the Labour Relations Amendment Bill of 2012 comes into operation.¹⁴⁵¹

Concluding remarks

The LRA as a piece of social legislation should be interpreted in a way that maintains both the values and the rights extended by the Constitution. The proper approach to the construct of s 186(1)(b) of the LRA is to interpret the provision as a whole and in the light of its purpose and the context within which it appears in the LRA.¹⁴⁵²

Despite the clear guidelines set by the Constitutional Court on how the LRA should be interpreted, the Labour Appeal Court failed to follow these prescripts.¹⁴⁵³ The effect of following a restrictive literal approach instead of a purposive one is that fixed term employees who expect more than what they previously had in terms of their fixed term appointment, would be left remediless in terms of the unfair dismissal provision in the LRA, even if the circumstances were such that the belief was reasonable.¹⁴⁵⁴ Because South Africa follows a system of legal precedent, this case will continue to have a negative impact in disputes where fixed term employees claim based on a reasonable expectation of permanent appointment.¹⁴⁵⁵

The fact that fixed term employees having a stronger expectation than for just a temporary renewal have no unfair dismissal protection is one of the anomalies that the legislature seeks to address by amending the LRA. In the next chapter, some provisions contained in the Labour Relations Amendment Bill of 2012 are considered in order to establish whether or not this flaw, among others, is adequately addressed in the new amendments.

¹⁴⁵¹ This will be discussed further in Ch 6 under 6.2.2.

¹⁴⁵² This is discussed under 5.1 and 5.2.

¹⁴⁵³ See the discussion under 5.3 above.

¹⁴⁵⁴ See the discussion under 5.3.

¹⁴⁵⁵ This is discussed in 5.4.

Amendments affecting fixed term employees



Introduction

The vulnerability of fixed term employees has resulted in separate policy measures specifically aimed at protecting them being developed in many other countries. Legislation has been enacted to regulate fixed term employment and in particular to mitigate discrimination against this vulnerable class of employee.

In the 1980's several European countries adopted rules to prevent the abuse of fixed term contracts and to address the disparity in the working conditions of fixed term employees and those who are appointed indefinitely. The use of successive fixed term appointments was largely ousted. Anti-discrimination mechanisms were also introduced in terms of Council Directive 1999/70/EC on Fixed Term Work. The Council Directive requires European countries to prevent abuse by introducing at least one protective measure.

In terms of the European Council Directive, employers are required to provide objective reasons for the conclusion or renewal of fixed term contracts and/or to establish a maximum period of appointment on successive fixed term contracts and/or to place a limitation on the number of renewals. The same mechanisms are also used outside of Europe to regulate fixed term employment. Most OECD countries restrict the use of temporary work by either setting limitations regarding the circumstances in which workers may be temporarily appointed or limiting the period of the engagement.¹⁴⁵⁶

¹⁴⁵⁶

Information regarding the regulation of fixed term contracts in the different OECD countries is available on the Centre for Economic Studies and Information Institute for Economic Studies accessible at http://www.cesifogroup.de/portal/page/portal/DICE_Content/LABOUR_MARKET_AND_MIGRATION/LABOUR_MARKET/LM080_EMPLOYMENT_PROTECTION_LABOUR_STANDARDS/reg-fix-term-contr.pdf (18 October 2012). See also Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' at 10.

In many countries a combination of these approaches are used so as not to prohibit legitimate use of fixed term contracts, while preventing abuse.¹⁴⁵⁷ The approach followed in different jurisdictions worldwide varies. The effectiveness in providing parity in employment rights and protections has also evidenced varying degrees of success.

Olivier distinguishes between two different models – one aimed at providing labour flexibility providing little protection to fixed term employees and the other which regulates the termination of fixed term employees more strictly.¹⁴⁵⁸ It seems as if South Africa is intending to take a huge leap from the flexible model to the strictly regulated one. In this chapter the proposed amendments in the Labour Relations Amendment Bill of 2012 affecting fixed term employees are considered.

One of the ambitious aims of the amendments is to make certain adjustments so that South Africa's legislations will meet international labour standards.¹⁴⁵⁹ This means not only complying with the international obligations of the country, but also conforming to standards laid down in other countries in protection of vulnerable employees. Therefore it is pertinent to draw on comparative international experiences in order to identify possible weaknesses and practical pitfalls in the proposed legislative amendments.

In this chapter, the international standards that South Africa is required to comply with are set out. Thereafter, the proposed amendments are set off against the mechanisms used in various other countries in order to establish whether or not this goal is achievable. In addition, similar mechanisms as used in other jurisdictions are scrutinised in order to evaluate whether or not the proposed amendments will address the current problems.

6.1 International obligations

The ILO was established in 1946 to give effect to the Treaty of Versailles of 1919 in order to ensure transnational global labour standards and to avoid exploitation of

¹⁴⁵⁷ RIA of 2010 at 3.

¹⁴⁵⁸ Olivier 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments' at 1023 - 1024.

¹⁴⁵⁹ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1(b).

employees. The ILO is intended to counter unemployment and loss of income and especially protect vulnerable employees' job security.¹⁴⁶⁰

South Africa has been a member of the ILO since 1919 and has ratified a number of its conventions.¹⁴⁶¹ South Africa, as a member of the ILO, must uphold the objects of the ILO pertaining to the rights to freedom of association, to engage in collective bargaining, equality at work, and the elimination of forced labour child and fundamental rights in regulation.¹⁴⁶²

As South Africa adopted the Declaration of Fundamental Rights at Work at the international Labour Conference in 1998, South Africa is obliged to observe the principles contained in certain of the ILO's core conventions.¹⁴⁶³ This means that domestic policy and practice must comply with the ILO constitution and the ratified conventions. The provisions of some of the adopted conventions have been placed on the agenda for purposes of the current labour law reform.¹⁴⁶⁴ Some of South Africa's important international labour law obligations are briefly considered below.

6.1.1 Freedom of association and protection of the right to organise

South Africa adopted the ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise. This convention guarantees the right of 'workers and employers, without distinction whatsoever' to form and join

¹⁴⁶⁰ ILO 'The need for social justice' accessed at <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm> (13 March 2013). See also Vettori Stella *The Employment Contract and the Changed World of Work* (2007) at 107.

¹⁴⁶¹ All the ILO Conventions that have been ratified by South Africa and the dates of their ratification are accessible at http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (23 April 2012).

¹⁴⁶² Ramutloa Lloyd 'Speech by the Minister of Labour, Hon. Mildred N Oliphant, MP on the occasion of the Employment Equity and Transformation Indaba, Birchwood, Johannesburg' accessed at <https://www.labour.gov.za/media-desk/speeches/2013/speech-by-the-minister-of-labour-hon-mildred-n-oliphant-mp-on-the-occasion-of-the-employment-equity-and-transformation-indaba-birchwood-johannesburg> (21 May 2013).

¹⁴⁶³ ILO 'Declaration of Fundamental Principles and Rights at Work' accessible at www.ilo.org (11 March 2013). See also Swepston L 'International Law' in Blanpain R (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 9th edn (Kluwer International 2010) at 145.

¹⁴⁶⁴ Ramutloa Lloyd 'Speech by the Minister of Labour, Hon. Mildred N Oliphant, MP on the occasion of the Employment Equity and Transformation Indaba, Birchwood, Johannesburg' accessed at <https://www.labour.gov.za/media-desk/speeches/2013/speech-by-the-minister-of-labour-hon-mildred-n-oliphant-mp-on-the-occasion-of-the-employment-equity-and-transformation-indaba-birchwood-johannesburg> (21 May 2013).

organisations.¹⁴⁶⁵ The broader reference to ‘worker’ insinuates that even self-employed workers, and not only ‘employees’ should have the right to freely organise.¹⁴⁶⁶ The Convention prohibits legislation or the application of any legislation in such a way as to impair the rights provided for therein.¹⁴⁶⁷ Member states that have ratified it, is obliged to provide appropriate and effective measures to ensure that workers and employers can exercise these rights.¹⁴⁶⁸ South Africa’s labour system uses voluntary collective bargaining as a mechanism for establishing working conditions.¹⁴⁶⁹ Chapter III of the LRA provides for the advancement of employees interests by means of mechanisms such as collective agreements and bargaining councils.¹⁴⁷⁰

The ILO Committee noted criticism made by the International Trade Union Confederation alleging among other things that ‘casual workers’ in South Africa experience difficulties in joining trade unions. Consequently, the South African government has been requested to provide information regarding how these obstacles are addressed in the Labour Relations Amendment Bill of 2012.¹⁴⁷¹

6.1.2 Equal pay for work of equal value

South Africa has also ratified the ILO Convention No. 100 of 1951 on Equal Wages for men and women that deliver services of equal value.¹⁴⁷² Article 2 of the Convention

¹⁴⁶⁵ Article 2 of ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise.

¹⁴⁶⁶ ILO *Freedom of Association* 4th edn (International Labour Office Geneva 1996) 51.

¹⁴⁶⁷ Article 8(2) of ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise.

¹⁴⁶⁸ Article 11 of ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise.

¹⁴⁶⁹ RIA of 2010 at 49. See also Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 103 and ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise and ILO Convention No. 98 of 1949 on the Application of Principles of the Right to Organise and to Bargain Collectively accessed at <http://www.ilo.org/> (12 March 2013).

¹⁴⁷⁰ ILO ‘NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014’ (29 September 2010) at 16.

¹⁴⁷¹ The complete comment regarding compliance with ILO Convention No. 87 on Protection of the Right to Organise is viewable at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3077989\(21 April 2013\).](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3077989(21 April 2013).)

¹⁴⁷² Van Niekerk ‘Regulating Flexibility and Small Business: Revisiting the LRA and BCEA: A Response to Halton Cheadle’s Concept Paper’ (2007) at 6.

requires that each member state who has ratified it¹⁴⁷³ should establish appropriate methods to determine rates of remuneration and apply these methods to ensure equal payment for equal work done by particularly men and women.¹⁴⁷⁴ This may be done by means of legislation or regulations,¹⁴⁷⁵ established machinery for wage determination¹⁴⁷⁶ or collective agreements,¹⁴⁷⁷ or a combination of these approaches.¹⁴⁷⁸

If it would assist in giving effect to the ILO Convention No. 100 of 1951, measures should be taken to promote objective appraisal of jobs on the basis of the work to be performed.¹⁴⁷⁹ The methods to be followed in order to establish job gradings may be decided upon by the authorities responsible for the determination of rates of remuneration, or by the parties to the collective agreement if appropriate.¹⁴⁸⁰ Differential rates of payment that are not discriminatory based on sex are excluded under this determination. In addition if different rates are paid to men and women, but objective appraisal standards are consistently applied by an employer, it will not in terms of this instrument be viewed as being discriminatory.¹⁴⁸¹

6.1.3 Elimination of discrimination

South Africa has also ratified ILO Convention No. 111 of 1958 which prohibits discrimination in the labour arena.¹⁴⁸² The Convention defines 'discrimination' as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

¹⁴⁷³ Article 6(1) of the ILO Convention No. 100 determines that it is binding on all member states that have ratified it. This Convention has been ratified by South Africa.

¹⁴⁷⁴ Article 2(1) of ILO Convention No. 100.

¹⁴⁷⁵ Article 2(2)(a) of the ILO Convention No. 100.

¹⁴⁷⁶ Article 2(2)(b) of the ILO Convention No. 100.

¹⁴⁷⁷ Article 2(2)(c) of the ILO Convention No. 100.

¹⁴⁷⁸ Article 2(2)(d) of the ILO Convention No. 100.

¹⁴⁷⁹ Article 3(1) of the ILO Convention No. 100.

¹⁴⁸⁰ Article 3(2) of the ILO Convention No. 100.

¹⁴⁸¹ Article 3(3) of the ILO Convention No. 100.

¹⁴⁸² Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA: A Response to Halton Cheadle's Concept Paper' (2007) at 6.

6.1.4 Protection of job security

The ILO Convention No. 158 of 1982 regarding Termination of Employment and the Termination of Employment Recommendation No. 166 of 1982 apply to termination of employment at the employer's initiative.¹⁴⁸³ Member states that have ratified the convention are required to implement measures aimed at the prevention of abuse resulting in lack of job security. The ILO's Employment Relationship Recommendation¹⁴⁸⁴ obliges member states to ensure effective protection of workers and in particular 'those affected by the uncertainty as to the existence of an employment relationship.'¹⁴⁸⁵ Both the Convention and the Recommendation require member states to take 'adequate safeguards' to protect employees against the abuse of fixed term contracts by employers as means of evading statutory unfair dismissal protection. Probation or a qualifying period is a permissible exception to the unfair dismissal protections.¹⁴⁸⁶ It is therefore allowable to set a qualifying service period before an employee would become entitled to the unfair dismissal protection. The LRA was enacted to comply with international standards and South Africa's constitutional obligations.¹⁴⁸⁷

Except for cases of serious misconduct which renders it unreasonable to expect an employer to keep the employee on, a worker would in terms of the Convention, be entitled to a reasonable period of notice or compensation in lieu thereof.¹⁴⁸⁸

From an international law view, greater flexibility or even the complete exclusion of fixed term employees from the dismissal protection would be permissible. But, due to the fact that South Africa's Constitution includes the right to fair labour practices, such a

¹⁴⁸³ Article 3 of the ILO Convention No. 158 of 1982 regarding Termination of Employment determines that the Convention's provision only applies in these circumstances. However, as indicated a dismissal as contemplated in s 186(1)(b) is also at the employer's initiative as explained under 1.2.2 in Ch 1.

¹⁴⁸⁴ ILO Employment Relationship Recommendation R198 of 15 June 2006.

¹⁴⁸⁵ ILO Employment Relationship Recommendation R198 at para 5.

¹⁴⁸⁶ Article 2(2)(b) of the ILO Convention No. 158 of 1982 on Termination of Employment and Article 2(2)(b) of the ILO Recommendation No. 166 of 1982 on Termination of Employment.

¹⁴⁸⁷ Borat & Cheadle 'Labour Reform in South Africa and a Synthesis of Policy Suggestions' DPRU Working Paper 09/139 (September 2009) at 26.

¹⁴⁸⁸ Article 11 of the ILO Convention No. 158 of 1982 regarding Termination of Employment. See also s 38 of the BCEA which in practical terms also guarantees the same right to notice to all South African employees.

restriction or exclusion could not be justified, unless it is capable of withstanding the test posed in the limitation clause.¹⁴⁸⁹

6.2 The Labour Relations Amendment Bill 2012

The African National Congress, South Africa's ruling party, committed the government to introducing and implementing legislation in order to regulate temporary work in an effort to avoid exploitation, to ensure decent work for all workers and to promote security of employment. In addition, provisions will be implemented to facilitate unionisation and promote the conclusion of sectoral collective agreements that covers vulnerable workers.¹⁴⁹⁰ Until recently very little special attention has been paid to fixed term employees in South Africa. No provisions are included in the LRA on the conditions for concluding fixed term contracts. Employers need not provide justification for the use of fixed term contracts and no limits are set on the number of times a fixed term contract may be renewed, or on the cumulative length of a fixed term appointment.

The Department of Labour in 2009 and 2010 proposed amendment of the main labour legislation.¹⁴⁹¹ The LRA, the BCEA and the EEA form the cornerstone of South African labour law. These statutes have for the most part remained unamended between 2002 and 2012. In 2012 amendments were proposed to all the main labour legislation in South Africa in order to respond to the current state of the country's labour affairs.¹⁴⁹² The Bills were supposed to be tabled in Parliament during the first quarter of 2012. However, the amendments to the LRA were only signed into law late in 2013.¹⁴⁹³

¹⁴⁸⁹ Van Niekerk 'Regulated Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' at 12.

¹⁴⁹⁰ African National Congress 'ANC 2009 Election Manifesto' accessed at <http://www.anc.org.za/docs/manifesto/2009/manifesto.pdf> (26 March 2013).

¹⁴⁹¹ The BCEA, the EEA and the LRA are to be amended. Only selected provisions pertaining to the dismissal of fixed term employees as provided for in the Labour Relations Amendment Bill of 2012 is discussed. The Amendment Bills are accessible at <https://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/> (27 November 2012). The other bills are also accessible on this website.

¹⁴⁹² The Bills are downloadable at <https://www.labour.gov.za/legislation/bills/proposed-amendment-bills> (23 February 2013).

¹⁴⁹³ The Labour Relations Amendment Bill of 2012 was approved by parliament on 20 August 2013. It is still to be signed into law by the President. See the report by Crinall Anildas 'National Assembly passes Labour Amendment Bill' accessed at <http://transformation.labournet.com/article-display/national-assembly-passes-labour-amendment-bill/159> (10 November 2013).

The Labour Amendment Bill of 2012 contains provisions that are aimed at ensuring that vulnerable employees receive adequate protection and decent conditions of work. In principle the Bill is proposed to ensure the protection of the constitutionally entrenched rights to fair labour practices and equality for all categories of employees since there are currently anomalies in the legislation that need to be rectified.¹⁴⁹⁴ The urgency of amending the labour legislation is driven by the increased prevalence and exploitation of atypical employees.¹⁴⁹⁵ Amendment is also required so as to ensure compliance with international labour standards related to freedom of association, collective bargaining and equality¹⁴⁹⁶ and to promote the efficiency of the labour institutions.¹⁴⁹⁷

In order to assess what the impact of the amendments would be, the Department of Labour requested that a regulatory impact assessment (RIA of 2010) be conducted.¹⁴⁹⁸ Although this impact assessment was based on amendments that were proposed in 2010 and which have been changed since, the RIA of 2010 still provides some insight on the considerations behind the amendments that are proposed in the Labour Relations Amendment Bill of 2012. No new assessment has been done based on the new provisions.

Fixed term employees are recognised as one of the vulnerable groups of employees in the Labour Relations Amendment Bill of 2012.¹⁴⁹⁹ In order to promote unionisation, a new stipulation is introduced.¹⁵⁰⁰ The definition of dismissal is amended to provide additional protection to fixed term employees who claim based on a reasonable expectation of indefinite employment. New protection is introduced specifically to guard atypical employees against abusive and discriminatory practices.¹⁵⁰¹ These mechanisms are briefly set out below.

¹⁴⁹⁴ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1(a) and (e).

¹⁴⁹⁵ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1(a).

¹⁴⁹⁶ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1(b).

¹⁴⁹⁷ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1(d).

¹⁴⁹⁸ See the Introduction of the RIA of 2010 at 10 – 11.

¹⁴⁹⁹ Memorandum of the Objects of the Labour Relations Amendment Bill, 2012 at 21. The groups acknowledged as vulnerable include employees appointed by temporary employment services and part-time employees. Although employees appointed by temporary employment services and as part-time workers may also be appointed indefinitely, these employees are included in the discussion since they could also be appointed on a fixed term basis.

¹⁵⁰⁰ See the discussion under 2.1 below.

¹⁵⁰¹ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 21.

6.2.1 Fixed term employees and union representativity

Currently South Africa's atypical workforce is to a large extent excluded from collective bargaining mechanisms. Little is done to promote access to union membership for these vulnerable employees.¹⁵⁰²

The Labour Relations Amendment Bill of 2012 proposes amendment of s 21 of the LRA by requiring consideration of the composition of the workforce, including the number of fixed term and part-time employees when deciding on whether or not a registered trade union should be granted organisational rights.¹⁵⁰³ The Labour Relations Amendment Bill of 2012 determines that a person, in establishing whether or not a trade union is sufficiently representative of the workforce, should take into account employees from temporary employment services, part-time and fixed term employees.¹⁵⁰⁴ The Minister of Labour will be mandated to consider the composition of the workforce in the sector and the extent to which fixed term employees are represented into account when determining whether or not a bargaining council is sufficiently representative.¹⁵⁰⁵ For purposes of organisational rights, employees appointed by temporary employment services will be regarded as part of the workplace of either the temporary employment service or the client for which they work.¹⁵⁰⁶

This should promote unionisation by making it easier for trade unions to gain representativity at a lower threshold. In addition, the amendment is intended to promote organisation of atypical employees.¹⁵⁰⁷ But, these amendments could also lead to subvergence of industrial action by employees. Smaller trade unions may become de-recognised if fixed term employees are taken into consideration in determining representativity thresholds. On the flipside, there could be a proliferation of trade unions that are considered as being sufficiently representative which could cause unacceptable levels of administrative burdens for employers if they are granted organisational rights. These are only possible consequences that could ensue. There is no evidence that I could adduce regarding the likelihood of either of these actually happening.

¹⁵⁰² See the discussion in Ch 1 under 1.2.3.

¹⁵⁰³ Section 21(v) of the Labour Relations Amendment Bill of 2012.

¹⁵⁰⁴ Section 21(8)(v) of the Labour Relations Amendment Bill of 2012.

¹⁵⁰⁵ Section 32(5A) of the Labour Relations Amendment Bill of 2012.

¹⁵⁰⁶ Memorandum of Objects Labour Relations Bill of 2012 at 3. In the introduction of the ILO Global Wage Report 2010/2011 the need to include vulnerable low-paid workers and atypical workers in trade unions is noted.

¹⁵⁰⁷ Memorandum of Objects Labour Relations Bill of 2012 at 2.

A very important amendment was also proposed in the BCEA Amendment Bill of 2012.¹⁵⁰⁸ Thresholds for representativeness and access to organisational rights may be set in terms of sectoral determinations when this legislation becomes operational. It is also suggested that the definition of 'workplace' should be amended in a way that it is capable of accommodating fixed term employees and other atypical workers. The Minister would be mandated to take the presence of, among others, fixed term employees into account when extending collective bargaining agreements in respect of bargaining councils.¹⁵⁰⁹

The BCEA Amendment Bill of 2012 will authorise the Minister to issue sectoral determinations without a prior recommendation by the Employment Conditions Commission. The Minister will also be able to introduce new sectoral determinations wherever there is no existing sectoral determination¹⁵¹⁰ or if an existing bargaining council agreement is not fully comprehensive and leaves space for intervention. The Minister could lower the threshold of representativity for union rights. The Minister of Labour is also empowered to set both minimum wages and minimum increases for employees covered by sectoral determinations. The main reason for strikes is usually disputes concerning wages.¹⁵¹¹ Setting of minimum wages is acknowledged by the ILO as an 'effective backstop at the lower end of the wage distribution.'¹⁵¹² But, minimum wages and increases do not increase productivity, neither do they contribute to increased job opportunities. In fact, the institution of minimum wages has been associated with job losses.¹⁵¹³

Legislation is usually used to set basic standards and to establish the machinery required to set minimum wages.¹⁵¹⁴ However, bargaining councils fulfil an important regulatory function. To promote efficiency, bargaining councils should be able to supplement wage increases through negotiation. In so doing, workers will become

¹⁵⁰⁸ The BCEA Amendment Bill, 2012 is available at <http://www.labour.gov.za/DOL/legislation/bills/proposed-amendment-bills> (1 November 2013). Only limited aspects of this proposed Bill are touched upon herein.

¹⁵⁰⁹ Section 55(4)(o) of the BCEA Amendment Bill of 2012.

¹⁵¹⁰ A number of Ministerial determinations have been set for various sectors of industries already in terms of ss 50 & 51 of the BCEA. See the sectoral determinations that have been implemented available at http://www.labour.gov.za/legislation/sectoral_index.jsp (22 January 2013).

¹⁵¹¹ RIA of 2010 at 98.

¹⁵¹² ILO Global Wage Report, African Brief 2010/2011 at 16. See also the further discussion regarding the positive impacts minimum wages can have as a supplement to collective bargaining at 17 - 20.

¹⁵¹³ See the SA News media report at <http://www.citypress.co.za/business/2-000-farm-workers-retrenched-ahead-of-new-minimum-wage-implementation/> (22 March 2013)

¹⁵¹⁴ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at para 115.

entitled to part of the fruits of their labour and wage discrepancies within a sector can be prevented.¹⁵¹⁵ Wages and other minimum standards are established by employers and employees instead of by the government. These standards meet the specific needs for the particular sector.¹⁵¹⁶

Currently, there is no living wage or ‘umbrella’ sectoral determination to set minimum wages and conditions for workers not covered by a bargaining council or sectoral determination. In Statistics South Africa’s LFS Report for the Second quarter of 2012 it was indicated that approximately 48.9 percent of employees received annual salary increases solely left within the discretion of their employers. Only 24 percent relied upon unions to negotiate salary increases. A mere 9.5 percent received salary increases determined by a bargaining council.¹⁵¹⁷ Inclusive sectoral bargaining would benefit fixed term employees.¹⁵¹⁸

In terms of the new amendment of the BCEA, the Minister of Labour is authorised to issue an ‘umbrella’ sectoral determination that also covers employees that are not covered by another sectoral determination or bargaining council agreement. This makes it possible to set national minimum wages. The Minister may also order minimum increases to be made. In addition the Minister may prohibit certain types of work to be performed under fixed term contracts and determine a required level of representativeness for trade unions in a sector.¹⁵¹⁹ However, the impact of efforts to cover fixed term employees would depend on the level of compliance by employers.

6.2.2 Dismissal provision will include fixed term employees who expect indefinite employment

Currently, fixed term employees who have a reasonable expectation of permanent employment are not covered by the dismissal provision as contained in s 186(1)(b) of the LRA. As discussed, the Labour Appeal Court excluded this remedy with final

¹⁵¹⁵ Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 118.

¹⁵¹⁶ Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at para 114.

¹⁵¹⁷ Statistics South Africa ‘Quarterly Labour Force Survey, Quarter 2, 2012’ at xiii.

¹⁵¹⁸ Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ at paras 129 & 139.

¹⁵¹⁹ Section 55(1) of the BCEA Amendment Bill of 2012.

effect.¹⁵²⁰ The Labour Relations Amendment Bill of 2012 proposes that s 186(1)(b) of the LRA be amended to read as follows:

‘an employee engaged under a fixed-term contract of employment reasonably expected the employer –

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.’

This amendment is intended to remove the anomaly in the current definition of dismissal of fixed term employees.¹⁵²¹ However, a clear distinction is made in this provision between a fixed term employee who reasonably expected to have his or her fixed term contract renewed temporarily and one who expects to be kept on indefinitely. As mentioned, the courts have not yet conclusively accepted that an employee can bring these claims in the alternative even though there may be circumstances in which a fixed term employee may expect to be kept on indefinitely, or at least until the person that he or she had been standing in for has, for instance, returned.¹⁵²² In other words, fixed term employees may have problems if the court does not accept that they, in fact, had the expectation that they allege.

Another concern is that it is not clear what is meant in the new part of the provision where it is stated that the expectation was that the employee would be retained permanently ‘on the same or similar terms’ as the fixed term contract. If the fixed term employee had expected to be permanently appointed, he or she would expect to receive benefits like the ones received by permanent employees as well. The courts have not accepted that a fixed term employee can expect substantive benefits outside of those that were contracted or can be reasonable expected. Reasonable expectations have also been restricted to only mean that to which a fixed term employee has and no more than that.¹⁵²³

¹⁵²⁰ See the discussion under 5.3 in Ch 5.

¹⁵²¹ Memorandum of the Objects Labour Relations Bill of 2012 at 16.

¹⁵²² This for instance happened in the *Dierks*-case. See the discussion under 3.3 in Ch 3.

¹⁵²³ See the different views of the meaning of ‘same or similar terms’ in the *Dierks*-case (discussed in 5.2.1.1) *SA Rugby* (in 5.2.1.2) and in *University of Pretoria v CCMA* (discussed in 5.3).

On a positive note, it will constitute a dismissal if a worker on a fixed term contract, who reasonably expected to be indefinitely appointed and either did not receive such an offer or an offer was made on less favourable terms. In effect, the finding of the Labour Appeal Court in *University of Pretoria v CCMA and others*¹⁵²⁴ will be overruled.

It is commendable that the legislature includes the possibility of a claim based on a reasonable expectation of permanent employment. But, the wording of the provision leaves a number of questions unanswered. Indefinite renewal of a fixed term contract does not equate to permanent appointment with all the attached perks and could only mean a continuation of the same unfair treatment. The way in which the provision is phrased seems to suggest that an employer can retain a fixed term employee indefinitely on the same or even worse terms than the fixed term contract when the expectation that was created. The fact that a fixed term employee proved a legitimate expectation of renewal of his or her contract of employment would still not make him or her entitled to the benefits which permanent employees enjoy.

Three references are made to the word 'retained' in the one subsection. It is interesting to note the origin of the word 'retain.' This word was originally derived from the Latin word 'retinere' which literally translated means 'to hold back'.¹⁵²⁵ If the courts interpret this provision literally, they could either interpret the word to mean exactly that, or it could be interpreted as meaning 'to keep in service'.¹⁵²⁶

Although another provision has been included in the Labour Relations Amendment Bill of 2012 to ensure the equal provision of benefits to fixed term employees,¹⁵²⁷ it is not provided specifically that a fixed term employee would be able to claim for the denial of benefits together with an unfair dismissal claim. It is not made clear how these provisions can be utilised simultaneously. Arguably if a fixed term employee claims that he or she had worked for years without receiving benefits, it would not be viewed as conducive of an expectation of permanent employment.

¹⁵²⁴ See the discussion under 5.3 in Ch 5.

¹⁵²⁵ 'Retained' on *Roget's 21st Century Thesaurus 3rd edn* accessed at <http://thesaurus.com/browse/retained> (14 November 2013).

¹⁵²⁶ See the definition of 'retain' on the *Farlex Free Online Dictionary* available at <http://legal-dictionary.thefreedictionary.com/retained> (14 November 2013).

¹⁵²⁷ Section 198B of the Labour Relations Amendment Bill of 2012 is discussed in 6.2.3.

The term 'reasonably expected' maintains the uncertainties surrounding what would qualify as a reasonable expectation.¹⁵²⁸ What is meant by the term 'same or similar terms'¹⁵²⁹ becomes even more uncertain.

In addition, it would seem like the remedies in ss 193 and 194 of the LRA with their limitations would remain applicable. The problems and restrictions relating to the available remedies would therefore still apply.¹⁵³⁰ Re-instatement as primary remedy fails in many respects in South Africa.¹⁵³¹ Due to the fact that compensation is often ordered it is very important that compensation provides a meaningful remedy. Currently, it often does not for fixed term employees.¹⁵³²

Some other countries provide the same remedies as South Africa. However, they have different ways in enforcing them or different factors are considered in determining the amount of compensation. In other jurisdictions, continuation of the employment relationship after an unfair dismissal is often made compulsory. In a country like South Africa that has such a high unemployment rate,¹⁵³³ the necessity of remedies for unfair dismissal that preserves employment security cannot be underestimated. It is sensible to consider the systems in other countries where this purpose is prioritised. This is discussed briefly below.

6.2.2.1 Preservation of employment

Germany's dismissal protections provide a good example of one where the remedies are the same as those in South Africa, but applied very differently. Since Germany's dismissal protections are strongly constitutionally based like South Africa's, it provides some valuable insight.¹⁵³⁴

In Germany, like in South Africa, re-instatement is the primary remedy. However, unlike in South Africa, it is largely enforced as such. Germany considers social conditions, age

¹⁵²⁸ See the discussion under 2.5 in Ch 2 and under 3.23 and 3.3 in Ch 3.

¹⁵²⁹ See the discussions under 5.2.11 and 5.3 in Ch 5.

¹⁵³⁰ Refer to the discussion in 3.5 in Ch 3.

¹⁵³¹ Also see 3.5.1 in Ch 3.

¹⁵³² This is discussed in 3.5.2 in Ch 3.

¹⁵³³ As mentioned, South Africa's unemployment rate is set at around 25% of 40% depending on which definition is used. See the discussion under 3 in Setting the scene.

¹⁵³⁴ Seifert Achim Jur Dr & Funkn-Hötzel Elke 'Wrongful Dismissals In The Federal Republic Of Germany' at 1 accessed at http://www.upf.edu/iuslabor/042005/Artic01.htm#_ftn2 (4 November 2013).

and job tenure as important in assessing selection criteria for retrenchments.¹⁵³⁵ Employers are obliged to consider alternatives to dismissal, such as transfers or retraining prior to any type of dismissal.¹⁵³⁶ Either party may apply for a dissolution order if continued employment would be intolerable, in which case the court will award compensation.¹⁵³⁷ Therefore, an order of compensation is the exception rather than the rule.

The courts enjoy less discretion to award compensation for unfair dismissal in Germany than in South Africa. The amount of compensation awards for unfair dismissal is capped, like in South Africa, but at a lower amount.¹⁵³⁸ However, an important difference lies in the fact that Germany's legislation recognises the importance of job security by accommodating older employees with many years of service whose employment have been terminated.¹⁵³⁹

In general, compensation amounts in Germany may not exceed twelve months' remuneration. However, employees who are over the age of 50 years and who have worked for the same employer for at least fifteen years may claim up to fifteen months and those over the age of 55 with twenty or more years of service can claim eighteen months' remuneration as compensation.¹⁵⁴⁰ The chance that employees are able to find alternative employment diminishes as they get older. Therefore, this is a factor that should be important in assessing the appropriateness of a remedy for unfair dismissal. South African courts do not currently take an employee's age into consideration when determining what remedy should be afforded or in determining the amount of compensation ordered.¹⁵⁴¹

Another important difference between South Africa and Germany's dispute resolution systems is that in Germany employees can continue working for the employer during the dispute resolution process.¹⁵⁴² Even though dispute resolution may continue for

¹⁵³⁵ Section 1(3) of the Protection against Dismissal Act of 1969 includes factors such as term of appointment, family responsibilities and severe disability as mandatory considerations before making the choice to dismiss a specific person for operational reasons.

¹⁵³⁶ Sections 1(2)(1) & 17(2) of the Protection against Dismissal Act of 1969.

¹⁵³⁷ Section 9 of Protection Against Dismissal Act of 1969.

¹⁵³⁸ Section 10 of the Protection Against Dismissal Act of 1969

¹⁵³⁹ Seifert Achim Jur Dr & Funkn-Hötzel Elke 'Wrongful Dismissals In The Federal Republic Of Germany' at 1 – 2. Accessed at http://www.upf.edu/iuslabor/042005/Artic01.htm#_ftn2 (4 November 2013).

¹⁵⁴⁰ Section 10 of the Protection Against Dismissal Act of 1969.

¹⁵⁴¹ See the discussion regarding determining the amount of compensation under 5.2 in Ch 3.

¹⁵⁴² Section 102 of the Works Constitution Act of 2001.

many months, the employee in the meantime, is ensured of an income. In addition, the process of dispute resolution is made less adversarial and the remedy of re-instatement, in so doing is preserved.

6.2.2.2 Unlimited compensation and/ or basic compensation awards

In Korea, the courts are authorised to make an order of compensation in any amount that it deems fair.¹⁵⁴³ However, the minimum compensation amount is set in the amount that the employee would have earned if he or she had not been dismissed.¹⁵⁴⁴ Although South African courts usually would consider the remaining portion of a fixed term agreement, there is no guarantee that fixed term employees would even receive full payment for the remainder of the contractual term.¹⁵⁴⁵

In the UK, redundancy payments received after termination of a fixed term employee's employment, would only be subtracted from the compensation amount if the compensation awards with the redundancy payment included, would exceed the basic award. The redundancy pay would also be subtracted if the employee's conduct had contributed to the termination of his or her services, or if he or she failed to take steps to mitigate his or her losses.¹⁵⁴⁶ If the principle is applied in the same way as in South Africa, redundancy payments would only be subtracted if the maximum award in terms of the LRA would be exceeded if the severance pay is included.

Article 56 of the Spanish legislation¹⁵⁴⁷ sets the legal limits for compensation awards for unfair dismissal. Should an employer fail to comply with the procedural requirements for individual or collective dismissals, or to prove the existence of a fair reason for the termination, the dismissal is considered to be unfair. The employer can in such circumstances choose between re-instatement and the payment of compensation. The compensation amount is capped at 24 months' wages, if the dismissed worker is appointed in terms of a contract for the promotion of indefinite employment (*'contrato de*

¹⁵⁴³ Article 28 of the Labour Standards Act 5309 of 1997.

¹⁵⁴⁴ Article 30(3) of the Labour Standards Act 5309 of 1997.

¹⁵⁴⁵ See the discussion under 3.5.2 in Ch 3.

¹⁵⁴⁶ Section 123(3) of the Employment Rights Act of 1996.

¹⁵⁴⁷ *Estatuto de los trabajadores* of 1996.

fomento de la contratación indefinida’) which may be concluded with fixed term employees who are appointed specifically to undergo training.¹⁵⁴⁸

If a dismissal is unfair for non-compliance with procedural requirements the employer is afforded a choice between re-instatement and back pay, or compensation for unfair dismissal.¹⁵⁴⁹ If an employer acknowledges that the dismissal was unfair and deposits compensation for unfair dismissal with the Labour Court within two days of the dismissal, the employee will not be able to claim any back pay if the Court makes a ruling that the dismissal was unfair.¹⁵⁵⁰

This system seems to provide more certainty than South Africa’s. Due to the fact that the employer is provided with a choice to either re-instate the employee or to pay compensation, the courts do not enjoy the same discretion regarding the amount of compensation to be afforded. In addition, the employer maintains business prerogative to decide whether or not the employee is to be part of the organisation again. This solution is sensible since employers are in a better position to determine its operational needs and to what extent the employment relationship has deteriorated.

6.2.2.3 Fixed term contract defined

Except for the protection of the new amendment to s 186(1)(b) of the LRA that will assist fixed term employees having a reasonable expectation of indefinite employment, a new clause is inserted to provide additional protection to them. For purposes of this provision ‘fixed term contract’ is defined for the first time.¹⁵⁵¹

The current s 186(1)(b) of the LRA is made applicable exclusively to employees appointed on fixed term contracts. However, no statutory definition of ‘fixed term employee’ exists in labour legislation. Since the statutory unfair dismissal protection as provided in the LRA deals with fixed term employees separately, this is an obvious lacuna. The Labour Relations Amendment Bill of 2012 defines the term ‘fixed term contract’ as a contract of employment that terminates upon the occurrence of an agreed

¹⁵⁴⁸ On compensation for unfair dismissal for workers under a contract for the promotion of indefinite employment see Law 12/2001.

¹⁵⁴⁹ Article 55(4) of the *Estatuto de los trabajadores*.

¹⁵⁵⁰ Articles 53(4) and 55(4) of the *Estatuto de los trabajadores*.

¹⁵⁵¹ Section 198B of the Labour Relations Amendment Bill of 2012.

upon event, the completion of a particular project or a specified date which is not the date on which the employee is required to retire.¹⁵⁵²

This definition is specifically intended for use in respect of s 198 and not for purposes of the amended s 186(1)(b) of the LRA. The new amended s 186(1)(b), like the current one, also requires a valid fixed term contract.¹⁵⁵³ Yet ‘fixed term contract’ or ‘fixed term employee’ is not defined for purposes of this provision.

The lack of a statutory definition of ‘fixed term contract’ led to incongruities in English jurisprudence. In *BBC v Ioannou*¹⁵⁵⁴ Lord Denning MR observed that a fixed term contract is a contract that cannot be ‘unfixed’ by either party providing notice. In other words termination by notice would be destructive of any ‘fixed term’ that could have been agreed by the parties. A contract terminating upon the completion of a defined project or task was not viewed as a fixed term contract. In *Dixon v BBC*¹⁵⁵⁵ this view was supported. The court held that to allow employers to include notice provisions so as to avoid being subject to the legislation, would make it too easy to evade the statutory protection provided to employees.¹⁵⁵⁶

In *Wiltshire County Council v National Association of Teachers in Further & Higher Education*¹⁵⁵⁷ it was decided that a contract for the performance of a specific task would not be considered to be a fixed term contract if no time was included in the contract indicating when the project would be completed.¹⁵⁵⁸ In *Weston v University College Swansea*¹⁵⁵⁹ a tribunal held that a three year appointment did not qualify as a fixed term appointment, because the appointment contained a salary scale which extended beyond the three year term that had been agreed upon.

Clearly, the proposed definition in the Labour Relations Amendment Bill of 2012 is wider than the one in England’s legislation. The remedy will consequently be of broader

¹⁵⁵² Section 198B(1) of the Labour Relations Amendment Bill of 2012.

¹⁵⁵³ Also see the discussion under 4.1 and 4.3.2 in Ch 4.

¹⁵⁵⁴ *BBC v Ioannou* [1975] ICR 267 (CA).

¹⁵⁵⁵ *Dixon v BBC* [1979] 1 ICR 281.

¹⁵⁵⁶ *Dixon v BBC* at 285 – 288.

¹⁵⁵⁷ *Wiltshire County Council v NATFHE* [1980] ICR 455.

¹⁵⁵⁸ *Wiltshire County Council v NATFHE* at 459. See also *Ryan v Shipboard Maintenance Ltd* [1980] 1 ICR 88 at 93 where this view was supported. The court’s reasoning was that the purpose of the contract is achieved through performance and in such a case there cannot be a dismissal.

¹⁵⁵⁹ *Weston v University College Swansea* [1975] IRLR 102 (IT).

application. This should prevent interlocutory applications regarding this jurisdictional aspect. However, the incongruities evidenced in England clearly indicate that the definition of 'fixed term contract' should be refined further so as to avoid potential problems in interpretation.

Guidelines are provided to determine who is a fixed term employee for purposes of the Australian legislation. In these guidelines, specific attention is paid to what is meant by the expression 'employee engaged under a contract of employment for a specified period of time' that is used in the regulations aimed at preventing the abuse of fixed term contracts for purposes of avoiding obligations in respect of termination of employment.¹⁵⁶⁰

In *Cooper v Darwin Rugby League Inc*¹⁵⁶¹ the contract was concluded for a specified period of time, but allowed for the termination on one month's notice by either party. The employer terminated the contract before the date of termination as indicated in the agreement. The court held that under such circumstances an employee would not be excluded from the dismissal provisions.

In *Andersen v Umbakumba Community Council*¹⁵⁶² it was decided that a fixed term contract must unambiguously indicate the date of commencement and completion of the contract. Where the termination only records the outer limit of the contract and either party can terminate the engagement by notice, the contract is not a fixed term contract. The inclusion of a term that a breach of contract is required before the innocent party may terminate the agreement would not constitute an unqualified right to terminate.

The courts have looked beyond the façade to give effect to the realities of an employment relationship. In *D'Lima v Board of Management, Princess Margaret Hospital of Children*¹⁵⁶³ the fixed term employee was engaged on a series of consecutive contracts. The contracts were continuous, except for a period of leave. The court held that the employment contract was concluded indefinitely and not only for a fixed term.

¹⁵⁶⁰ Regulation 3.2 amended regulation 30B(2). See also reg 3 of the Workplace Relations Regulations (Amendment) 1997 No. 101 accessed at http://www.austlii.edu.au/au/legis/cth/num_reg_es/wrr1997n101436.html (20 November 2012).

¹⁵⁶¹ *Cooper v Darwin Rugby League Inc* (1994) 1 IRCR 130.

¹⁵⁶² *Andersen v Umbakumba Community Council* (1994) 126 ALR 121.

¹⁵⁶³ *D'Lima v Board of Management, Princess Margaret Hospital of Children* (1995) AILR 3-173.

A contract that specifies a termination date terminates automatically on such an agreed upon date. It is not terminated at the employer's initiative. In *Fisher v Edith Cowan University*¹⁵⁶⁴ the fixed term employee was employed on three consecutive contracts. Prior to the expiration of the final contract the position that the fixed term employee had been filling was advertised. The fixed term employee applied for the position, but was unsuccessful. On the facts, the court held that the use of a fixed term contract had not been unreal, unconscientious or oppressive. This finding was based on the fact that fixed term contracts was acknowledged and regulated under the award provisions covering the employment of the employee at the university.

It is preferable to include a definition for purposes of clarification of the legislation. It may be helpful if guidelines similar to those used in Australia are introduced in a Code of Good Practice in South Africa to show how the courts have interpreted the definition after the enactment of the Amendment Act. In so doing, one jurisdictional obstacle may be addressed.

6.2.3 Equal treatment of fixed term employees after six months

An employer will no longer be allowed to treat fixed term employees less favourably than indefinitely appointed employees who do the same or similar work after they have worked for a period of six months or longer.¹⁵⁶⁵ A fixed term employee will also be entitled to the same access to opportunities to apply for vacancies in the workplace as permanent employees.¹⁵⁶⁶ If a fixed term employee is appointed for a period exceeding two years he or she would, subject to certain conditions, qualify for severance pay like a permanent employee.¹⁵⁶⁷ The new provision relating to severance pay will apply even if the reason for the termination of work does not relate to the employer's operational reasons. Instead this severance payment will be made to employees in recognition of long service, hence the two year qualification period.

The Labour Relations Amendment Bill of 2012 determines that for purposes of ascertaining whether or not justifiable reasons for differential treatment exists, the

¹⁵⁶⁴ *Fisher v Edith Cowan University* (unreported) 12 November 1996 No. WI 1061 of 1996.

¹⁵⁶⁵ Section 198B(8) of the Labour Relations Amendment Bill of 2012.

¹⁵⁶⁶ Section 198B(9) of the Labour Relations Amendment Bill of 2012.

seniority, length or service and experience of the respective employees should be taken into consideration.¹⁵⁶⁸ In addition, the merit of the two individuals should be compared in relation to the quality and quantity of work which the respective employees are required to perform.¹⁵⁶⁹ The employer would also be permitted to raise any other criteria that are not prohibited in terms of the anti-discrimination clause in the EEA.¹⁵⁷⁰

6.2.4 Restriction of the use of temporary employment services

The amended s 198A of the LRA is intended to protect vulnerable employees working for temporary employment services against abuse by restricting the use of temporary employment services to legitimate situations.¹⁵⁷¹ For purposes of the application of this provision, 'temporary services' is defined as work for a client by an employee for a period of time not exceeding three months;¹⁵⁷² as a substitute for one of the client's employees during a temporary absence;¹⁵⁷³ or for a period of time stipulated as being temporary in terms of a collective agreement, a sectoral determination or a notice published by the Minister of Labour.¹⁵⁷⁴ In other words, unless a temporary employment service complies with the conditions as set out in the LRA, a collective agreement or a bargaining council having jurisdiction over the client for whom the fixed term employee is working, it will not be permitted for it to appoint such an employee.¹⁵⁷⁵ This provision excludes employees earning more than the threshold amount as set by the Minister of Labour in terms of s 6(3) of the BCEA.¹⁵⁷⁶

¹⁵⁶⁷ Section 198B(10) of the Labour Relations Amendment Bill of 2012.

¹⁵⁶⁸ Section 198D(2)(a) of the Labour Relations Amendment Bill of 2012. This is used for the processes proposed in ss 198A(5), 198B(3) and 198C(2)(a) of the Bill.

¹⁵⁶⁹ Section 198D(2)(c) of the Labour Relations Amendment Bill of 2012.

¹⁵⁷⁰ Section 198D(2)(d) of the Labour Relations Amendment Bill of 2012. Section 6 of the EEA prohibits unfair discrimination on arbitrary grounds. See also the discussion under 1.3 in Ch 1.

¹⁵⁷¹ In the Labour Relations Amendment Bill of 2000 a similar type of mechanism was proposed. The proposal was to allow for the payment of an arbitration fee to the CCMA in disputes involving higher earning employees. The justification was that this would promote the use of private arbitrations. This proposal was however not accepted. See Benjamin & Gruen 'The Regulatory Efficiency of the CCMA: A Statistical Analysis' at para 67.

¹⁵⁷² Section 1(a) of the Labour Relations Amendment Bill of 2012. The Congress of South African Trade Unions (COSATU) which is one of South Africa's three largest trade union federations representing about 1.8 million employees has called for a complete ban on labour brokerage. See COSATU's submission to parliament on the labour law amendment bills dated 31 July 2013 accessed at <http://www.cosatu.org.za/docs/subs/2012/submission0731.html> (4 November 2013). For further information regarding the trade union federation visit <http://cosatu.org.za/>. They did manage to decrease the initial term in s 198 in the Labour Relations Amendment Bill of 2012 from 6 months to 3 months.

¹⁵⁷³ Section 1(b) of the Labour Relations Amendment Bill of 2012.

¹⁵⁷⁴ Section 1(c) of the Labour Relations Amendment Bill of 2012.

¹⁵⁷⁵ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 22.

¹⁵⁷⁶ Section 198A(2) of the Labour Relations Amendment Bill of 2012.

A new s 200B is introduced which provides for liability of employers for failure to abide by their statutory obligations. In terms of the proposed provision employees appointed by labour brokers must be employed indefinitely, unless the employer can justify a temporary appointment. Should more than one person be considered to be the employer, they would be jointly and severally liable for any failure to comply with the statutory obligations.¹⁵⁷⁷ This provision determines that an ‘employer’ can be one or more persons who carry on associated or related activities or businesses if the intent or effect of this is or has been to directly or indirectly avoid the statutory purposes or obligations.¹⁵⁷⁸

Joint and several liability is imposed upon both an employer and ‘associated or related persons’.¹⁵⁷⁹ A company that sub-contracts work will become jointly liable together with the placement agency for unfair labour practices by its sub-contractors. The doctrine of joint employment upon which the proposed principle is molded is used in the US. This doctrine developed when courts started treating corporations engaged in joint ventures as joint employers of the employees in the undertakings. Later, the doctrine expanded to also cover other instances where control over a worker is shared. To be an employer in the US you need to have a material effect or influence on employment matters including hiring, firing or supervising that are considered to be essential to the labour relationship.¹⁵⁸⁰ Consequently, it is possible to, based on this doctrine, consider clients to be co-employers.¹⁵⁸¹

This should address situations where employers use complex commercial arrangements in order to evade legal compliance. Holding all the parties accountable will remove this incentive.¹⁵⁸²

After three months of appointment by a labour broker a fixed term employee will be deemed to be employed by both the client and the labour broker.¹⁵⁸³ The fairness of

¹⁵⁷⁷ Section 200B(2) of the Labour Relations Amendment Bill of 2012.

¹⁵⁷⁸ Section 200B(1) of the Labour Relations Amendment Bill of 2012.

¹⁵⁷⁹ Section 200B(2) of the Labour Relations Amendment Bill of 2012.

¹⁵⁸⁰ *Goodyear Tire & Rubber Co* 312 NLRB (1993) 676.

¹⁵⁸¹ Mitlacher Lars W ‘The Role of Temporary Agency Work in different industrial relations systems – a comparison between US and Germany’ *British Journal of Industrial Relations* 45:3 September 2007 581. See also *Boire v Greyhound Corp* 376 US 473 (1964) in which this principle was applied.

¹⁵⁸² Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 28.

¹⁵⁸³ Section 198(1)(b) of the Labour Relations Amendment Bill of 2012.

termination of an assignment within the three month period prescribed by this provision may be challenged in terms of the LRA.¹⁵⁸⁴

Critics denounce the proposed restrictions on labour-broking. Nevertheless, even they are in agreement that additional protection is required for South African employees engaged in triangular relationships in South Africa.¹⁵⁸⁵

6.2.4.1 Labour brokerage: International practice

Whereas employment agencies were previously greatly restricted or even banned in several European countries, most of these restrictions and bans were lifted in the mid 1990's to promote flexibility and in so doing, enhance employment. There has since been a major growth in the employment segment appointed by agencies under contract.¹⁵⁸⁶ Internationally, the trend is to allow the use of, what we know as temporary employment services, but to guard against abuse of these vulnerable workers through regulation. In 2009 the Namibian Supreme Court held that banning labour brokerage in that country would constitute a disproportionate response to address the abuses that are generally associated with this form of employment. It was held that it would be unconstitutional to detract from the flexibility of the labour market in a way which would not be promoting entry into the labour market if it is possible to, through proper regulation of agency work under the Constitution and the ILO Convention No. 181 of 1997 on Private Employment Agencies, address the problems in an equally effective way.¹⁵⁸⁷

¹⁵⁸⁴

Memorandum of Objects Labour Relations Amendment Bill of 2012 at 23.

¹⁵⁸⁵

The SA Chamber of Commerce and Industry alluded that certain aspects contained in the Labour Relations Amendment Bill could possibly negatively affect investment in the country. This statement was made with particular reference to the possible practical ban on labour brokerage. See the full report in Fin 24 available on the Fin24.com website at <http://www.fin24.com/Economy/Labour-amendments-could-hurt-Sacci-20130612> (24 June 2013). See also the report in the Citizen available at <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=436053&sn=Detail&pid=334&Employers-against-labour-broker-ban-> (24 June 2013).

¹⁵⁸⁶

RIA of 2010 at 30.

¹⁵⁸⁷

Africa Personnel Services (Pty) Ltd v Government of Namibia & others [2009] NASC 17 at paras 34 - 35, 65 & 118.

6.2.5 Equal treatment for part-time employees

Fixed term employees can be appointed on a full-time or part-time basis.¹⁵⁸⁸ The new s 198C that is introduced in the Labour Relations Amendment Bill of 2012 is intended to provide additional protection to part-time employees that are paid an hourly wage¹⁵⁸⁹ earning no more than the specified threshold amount.¹⁵⁹⁰ This provision requires that an employer treats a fixed term employee no less favourably than comparable employee after six months unless there is a justifiable reason. A justifiable reason would include considerations of seniority, experience or length of service, merit, quantity or quality of work performed and other relevant factors that are not prohibited by s 6 of the EEA.¹⁵⁹¹ This provision requires that an employer must, considering the hours that the part-time employer works, not treat him or her on the whole less favourably than it does a comparable full-time employee¹⁵⁹² unless it can be justified.¹⁵⁹³ Part-time workers must be provided with access to training which, holistically viewed, must be on par with opportunities for skills development that is provided to a comparable full-time employee.¹⁵⁹⁴ The same opportunity must also be provided to part-time employees to apply for vacancies in the workplace, as for permanent employees.¹⁵⁹⁵

When identifying a 'comparable full-time employee', regard should be had to the type of employment relationship and the nature of the performance rendered by the respective employees.¹⁵⁹⁶ The permanent employee should work in the same workplace as the part-time employee.¹⁵⁹⁷ If there is nobody in the workplace with whom to compare the

¹⁵⁸⁸ Grogan *Workplace Law* (2009) at 20.

¹⁵⁸⁹ In terms of s 198C(1)(a) of the Labour Relations Amendment Bill of 2012 a 'part-time employee' is defined as 'an employee who is remunerated wholly or partly by reference to the time that the employee works and who works fewer hours than a comparable full-time employee.'

¹⁵⁹⁰ Section 198C(2)(a) of the Labour Relations Amendment Bill of 2012 excludes part time employees who earn more than the amount prescribed wage as determined by the Minister in terms of s 6(3) of the BCEA. Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 27 – 28. The grounds listed in terms of s 6 of the EEA are included in the discussion under 1.3.2 in Ch 1.

¹⁵⁹¹ A 'comparable full-time employee' for purposes of s 198C Of the Labour Relations Bill of 2012 is defined in s 198C(b) as someone remunerated with reference to the time that he or she works and who is identifiable as full-time considering the employers specific customs and practices. A full-time employee, whose hours of work are reduced according to an agreement for a temporary period, is not considered a comparable full-time employee.

¹⁵⁹³ Section 198C(3)(a) of the Labour Relations Amendment Bill of 2012.

¹⁵⁹⁴ Section 198C(3)(b) of the Labour Relations Amendment Bill of 2012.

¹⁵⁹⁵ Section 198C(4) of the Labour Relations Amendment Bill of 2012.

¹⁵⁹⁶ Section 198C(5) of the Labour Relations Amendment Bill of 2012.

¹⁵⁹⁷ Section 198C(5)(a) of the Labour Relations Amendment Bill of 2012.

part-time employee, a comparable full-time employee in another workplace may be used.¹⁵⁹⁸

This provision is guided by the principles laid down in the ILO Convention No. 175 of 1994 on Part-time Work that is applied in the European Union.¹⁵⁹⁹ The European Union has often been criticised for having rigid policies.¹⁶⁰⁰ The provision excludes a number of part-time employees from its operation. It does not apply to persons working in terms of a statute, sectoral determination or a collective agreement. Furthermore, employers who employ less than ten employees or less than 50 employees and who have been in existence for less than two years are excluded from this provision.¹⁶⁰¹ This provision will also not generally apply to part-time employees working for an employer who employs less than ten workers. Fledgling employers who have been in existence for less than two years and who employ less than 50 employees will also usually be excluded from the operation of this provision.¹⁶⁰²

However, part-time employees working for these excluded employers would enjoy the protection provided if such an employer is conducting more than one business.¹⁶⁰³ Those working for employers who were formed by the division or dissolution of a business and would otherwise not have been excluded would also enjoy protection.¹⁶⁰⁴ Part-time workers who on average works for an employer for less than 24 hours per month and those part-time employers who have not yet accumulated six months of service with the employer are also excluded.¹⁶⁰⁵

Fixed term employees are usually not prevented from working for doing other work while they are temporarily employed. It is not made clear in the legislation that the only income that will be considered is the income derived from his or her fixed term position with the employer.

¹⁵⁹⁸ Section 198C(5)(b) of the Labour Relations Amendment Bill of 2012.

¹⁵⁹⁹ ILO Convention No. 175 of 1994. See also the Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 26.

¹⁶⁰⁰ Anuedo-Dorantes Catalina & Serrano-Padial Ricardo 'Fixed-term employment and its poverty implications: Evidence from Spain' *Focus* Vol. 23 No. 3 Spring 2005 at 42.

¹⁶⁰¹ Memorandum of Objects Labour Relations Bill 2012 at 24.

¹⁶⁰² Section 198C(2)(b) of the Labour Relations Amendment Bill of 2012.

¹⁶⁰³ Section 198C(2)(b)(i) of the Labour Relations Amendment Bill of 2012.

¹⁶⁰⁴ Section 198C(2)(b)(ii) of the Labour Relations Amendment Bill of 2012.

¹⁶⁰⁵ Section 198C(2)(c) and (d) of the Labour Relations Amendment Bill of 2012.

In assessing whether or not a fixed term employee is being treated less favourably than a comparable permanent employee, the respective employee's entire remuneration package will be considered. If a fixed term employee is not covered by the employer's pension scheme, but receives extra salary enabling him or her to contribute to a private pension plan, it would, for instance, not be unequal treatment. But, fixed term employees are normally not precluded from doing other work. It is not clear from the new provision regarding the threshold amount for eligibility whether or not only the income received from that particular employer will be considered in assessing the amount of a fixed term employee's income.¹⁶⁰⁶

A 'comparable' full-time employee is someone who is paid for the time that he or she works and qualifies as full-time in accordance with the employer's practices and customs.¹⁶⁰⁷ In other words, if all employees are permitted to go home at 13h00 every day, the fact that someone is only required to work until such time, would not exclude him or her from qualifying as a comparable 'full-time' employee. A permanent employee whose working hours are in terms of an agreement temporarily reduced due to the employer's operational reasons does not qualify as a comparable full-time employee.¹⁶⁰⁸ A fixed term employee could qualify as a part-time worker if he or she is remunerated according to the hours worked and works under an arrangement where they are not required in the workplace during all office hours. Therefore under certain circumstances, a fixed term employee would be able to rely on the provision pertaining to equal treatment of part-time employees. If he or she is not paid per hour work, the remedy available for fixed term employees would be relevant.

6.2.6 Severance pay will become payable to certain fixed term employees

Fixed term employees are entitled to severance pay if their contracts are terminated prematurely for operational reasons.¹⁶⁰⁹ However, in practice they are often denied severance payment and the labour tribunals do not enforce the payment of severance

¹⁶⁰⁶ Section 198C(3) of the Labour Relations Amendment Bill of 2012.

¹⁶⁰⁷ Section 198C(b)(i) of the Labour Relations Amendment Bill of 2012 .

¹⁶⁰⁸ Section 198C(b)(ii) of the Labour Relations Amendment Bill, 2012.

¹⁶⁰⁹ Section 41 of the BCEA.

pay even when a dismissal for operational reasons was held to be unfair where fixed term employees are concerned.¹⁶¹⁰

In terms of the Labour Relations Amendment Bill of 2012 in the absence of a collective agreement to the contrary, severance pay will become payable to certain fixed term employees who are appointed continuously for a period exceeding 24 months.

An employer who appoints a fixed term employee for the completion of a particular project for a period that exceeds 24 months is obliged to upon the completion of the contract and subject to a collective agreement in the workplace, pay the fixed term employee one week's remuneration for each completed year of service.¹⁶¹¹ If an employee refuses the employer's offer of employment with that employer or any other employer and the refusal to accept such an offer is found to have been unreasonable, he or she would forfeit severance pay.¹⁶¹² This is the same as the principle applied in terms of the BCEA.¹⁶¹³

The proposed clause will also only apply to fixed term employees who earn below the prescribed earnings threshold.¹⁶¹⁴ Fixed term employees employed by employers who have less than ten employees or employs less than 50 employees and has not yet been in existence for two years are also excluded unless the employer conducts more than one business or the business in which the fixed term employee is working was formed by a division or dissolution of some other business.¹⁶¹⁵ In addition, if a fixed term employee is engaged in terms of a fixed term contract regulated in terms of other legislation, a sectoral determination or a collective agreement, the provision will not apply.¹⁶¹⁶

¹⁶¹⁰ See for instance *Khumalo v Supercare Cleaning* [2000] 8 BALR 892 (CCMA) at 897D - F. See further *SACCAWU obo Makubalo & Others v Pro-Cut Fruit & Veg* [2002] 5 BALR 543 (CCMA) at 545E.

¹⁶¹¹ Section 198B(10) of the Labour Relations Amendment Bill of 2012. See also the Memorandum of the Objects of the Labour Relations Amendment Bill at 26.

¹⁶¹² Section 198B(11) of the Labour Relations Amendment Bill of 2012.

¹⁶¹³ Section 41(4) of the BCEA.

¹⁶¹⁴ Section 198B(2)(a) of the Labour Relations Amendment Bill of 2012.

¹⁶¹⁵ Section 198B(2)(b) of the Labour Relations Amendment Bill of 2012.

¹⁶¹⁶ Section 198B(2)(b) of the Labour Relations Amendment Bill of 2012.

6.2.6.1 Severance pay payable to fixed term employees in other jurisdictions

Like in South Africa, a fixed term employee in the UK is only entitled to severance pay if he or she is dismissed for operational reasons. This right is further restricted to employees with at least two years' service with an employer.¹⁶¹⁷

In Spain, a fixed term employee is entitled to severance pay upon the expiry of the contract or the completion of work. Therefore, the instances are not restricted to cases of redundancy. However, fixed term employees appointed for training purposes or to replace employees during temporary absence are not entitled to any severance pay.¹⁶¹⁸

In terms of the Labour Reform Act¹⁶¹⁹ the amount of severance pay to which a fixed term employee would be entitled is currently ten days' remuneration for each completed year of service. In 2014 it will increase to eleven days and in 2015, twelve days' remuneration.¹⁶²⁰

The proposed amendment to the LRA determines that certain fixed term employees who are engaged in employment will be entitled to severance pay upon termination of their employment. The proviso is that a fixed term employee has to work for an employer for a period of at least 24 months before he or she would become eligible.¹⁶²¹

This seems to be the same as the situation in the UK, except that in South Africa the redundancy payment will be made in recognition of long service, like in Spain instead of being restricted to cases of actual redundancy.

6.2.7 Restriction and conditions for review applications

Currently there are many problems in the South African labour dispute resolution system related to review applications. These applications can cause major delays and affect access to social justice very negatively.¹⁶²² The new Labour Relations Amendment Bill of 2012 seeks to address these problems by introducing new time limits

¹⁶¹⁷ Section 155 of the Employment Rights Act of 1996.

¹⁶¹⁸ Article 49(1)(c) of the *Estatuto de los trabajadores* of 1995.

¹⁶¹⁹ Labour Reform Act 35 of 2010.

¹⁶²⁰ See Transitory Provision 13 of the *Estatuto de los trabajadores* of 1995.

¹⁶²¹ Section 198B(10) of the Labour Relations Amendment Bill of 2012.

¹⁶²² See the discussion in Ch 4 under 4.3.2.

and placing conditions on the referral of reviews to the Labour Court. This is discussed briefly below.

6.2.7.1 Time limits set for review applications

The proposed amendments in the Labour Relations Amendment Bill of 2012 are aimed at ensuring that delays in the resolution of labour disputes are restricted.¹⁶²³ A new time limit is set for the referral of a matter on review to the Labour Court. Unless good cause can be shown for bringing a late application and condonation is granted, a matter must in terms of the new provision be heard within six months of delivery of the application subject to the Labour Court Rules.¹⁶²⁴

A limit is also set for the time in which judgments in review proceedings must be handed down. This must happen as soon as it is reasonably possible, but no later than six weeks after the final day of the hearing unless there are exceptional circumstances.¹⁶²⁵

6.2.7.2 Employers will have to pay in security

If an order for re-instatement or re-appointment is made against an employer in an arbitration award and it wishes to suspend the enforcement thereof, an amount equal to 24 months' worth of the employee's remuneration will have to be paid as security by the employer, unless the LC determines otherwise.¹⁶²⁶ If the order is for the payment of compensation, the security amount must at least cover the amount of compensation that was ordered after the arbitration, unless the LC decides differently.¹⁶²⁷ An application for review to set aside an arbitration award will interrupt prescription of a claim for purposes of the arbitration award.¹⁶²⁸

¹⁶²³ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 13.

¹⁶²⁴ Section 145(5) of the Labour Relations Amendment Bill of 2012.

¹⁶²⁵ Section 145(6) of the Labour Relations Amendment Bill of 2012. See also the Memorandum of the Labour Relations Amendment Bill of 2012 at 14.

¹⁶²⁶ Section 145(8)(a) of the Labour Relations Amendment Bill of 2012.

¹⁶²⁷ Section 145(8)(b) of the Labour Relations Amendment Bill of 2012.

¹⁶²⁸ Section 145(9) of the Labour Relations Amendment Bill of 2012.

Importantly, instituting review proceedings will not suspend the operation of any arbitration award that has been made, unless the person who refers the matter for review furnishes security.¹⁶²⁹ In other words, the employer would have a choice between paying the amount ordered in the arbitration award or the maximum claimable amount in terms of s 194 of the LRA in security. As arbitration awards are usually made in amounts that are far less than the statutory maximum,¹⁶³⁰ it would be an obvious choice to rather pay the award amount.

6.2.7.3 Reviews of points *in limine* will be made exceptional

A new provision is introduced which determines that unless there are exceptional circumstances, the Labour Court will not be permitted to review a CCMA ruling made during conciliation or arbitration proceedings before the matter has been brought to finality in the CCMA or the bargaining council having jurisdiction.¹⁶³¹ The jurisdiction of the LC to adjudicate unresolved disputes over which the CCMA has jurisdiction will be restricted to instances where the Court acts as an arbitrator for the sake of convenience and if the parties consent to continue with the dispute in the LC for reasons of expedience.¹⁶³² The LC would, in such circumstances, only be entitled to make an order subject to the limitations of arbitration awards.¹⁶³³ The LC will be required to hand down a judgment by no later than six months after the final day of the hearing unless there are exceptional circumstances.¹⁶³⁴

The amendment is aimed at ensuring that review applications are not, except in exceptional cases, referred unless it can bring a matter to finality.¹⁶³⁵ Decisions would only be allowed to be taken on review before the conclusion of the arbitration proceedings in exceptional circumstances. This amendment is proposed to limit the amount of piece-meal review applications and prevent undue delays.¹⁶³⁶ It would also address the problem encountered in matters like *University of Pretoria v CCMA &*

¹⁶²⁹ Section 145(7) of the Labour Relations Amendment Bill of 2012.

¹⁶³⁰ As mentioned, the awards on average amount to about 6 months' remuneration as compensation in cases where dismissals are both substantively and procedurally unfair. See 5.2 in Ch 3.

¹⁶³¹ Section 157(1B) of the Labour Relations Amendment Bill of 2012.

¹⁶³² Section 157(2)(b) read with s 157(5) of the Labour Relations Amendment Bill of 2012.

¹⁶³³ Section 158(2) of the LRA.

¹⁶³⁴ Section 157(5) of the Labour Relations Amendment Bill of 2012.

¹⁶³⁵ Section 157(1B) of the Labour Relations Amendment Bill of 2012.

¹⁶³⁶ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 15.

*others*¹⁶³⁷ where the merits of the case were never heard before the decision was made that the fixed term employee had not been dismissed because she expected permanent appointment and not only temporary renewal.¹⁶³⁸

The requirement regarding the payment of security pending the outcome of the review could limit the number of referrals of disputes on review. However, it would not necessarily lessen the burden of the Labour Court. South Africa's dispute resolution system is adversarial by nature. Employers are often willing to pay large amounts of money to oppose an employee's claims, despite the relatively low compensation awards that are usually made in adverse rulings against them. In *Gubevu Security Group Pty Ltd and Ruggiero NO & others*¹⁶³⁹ for instance, the LC noted that, to have taken this matter on review, the employer had chosen to incur legal costs well exceeding the amount of compensation which the arbitrator had initially awarded.¹⁶⁴⁰

In the RIA of 2010 it is opined that not being able to refer a matter for review before its finalisation in the CCMA could result in an increase in legal fees. If the parties appointed legal representation, they would possibly have to pay more because the referral to the labour court is delayed.¹⁶⁴¹ This argument is not very strong, since the procedures followed by the CCMA already necessitate appointment of legal representatives.¹⁶⁴² The amendment would, in actual fact, prevent unnecessary delays in the dispute resolution processes and result in a cost-effective and speedy resolution of disputes on the merits. A subsequent review will also be simplified since the matters in dispute will already have been identified.

6.2.8 The scope of the statutory presumption of who qualifies as an 'employee' will be extended

Section 200A of the LRA is to be amended by extending the scope of the statutory presumption in favour of an employment relationship. In future, the application of all

¹⁶³⁷ *University of Pretoria v CCMA & others* [2011] ZALAC 25 (LAC). See the discussion of the interpretation followed by the Labour Appeal Court in this case under 3 in Ch 5.

¹⁶³⁸ See the discussion of the interpretation followed by the Labour Appeal Court in this case under 5.3 in Ch 5.

¹⁶³⁹ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* (2012) 33 ILJ 1171 (LC).

¹⁶⁴⁰ *Gubevu Security Group Pty Ltd and Ruggiero NO & others* at paras 27 – 29.

¹⁶⁴¹ RIA of 2010 at 114.

¹⁶⁴² The over-technicality of the CCMA process is discussed under 3 in Ch 4.

employment legislation as well as s 98A of the Insolvency Act¹⁶⁴³ will be made subject to the statutory presumption, regardless of the form of contract in terms of which a person is employed.¹⁶⁴⁴ The aim is to align the labour legislation with the Occupational Health and Safety Act.¹⁶⁴⁵

The statutory presumption has not previously been very helpful in the assessment of who qualifies as an employee.¹⁶⁴⁶ Giving the statutory presumption a larger area of application, in my opinion, will have little positive effect on legal certainty regarding who qualifies for labour legislation protection.

6.3 Problems in proving that work is ‘comparable’ to a permanent employee’s work

Before a fixed term employee would be entitled to claim that he or she is being treated less favourably than an indefinitely appointed employee, he or she will have to prove that the work he or she performs is similar to that of a comparator.¹⁶⁴⁷ If a fixed term employee is able to prove that the work is the same, or broadly similar to that of a comparator, the employer can nevertheless prove that there are substantial differences. Immaterial differences will not be taken into account.¹⁶⁴⁸

This presents certain problems. In proving that a comparator’s work is the same or of equal value, the similarity in the jobs must be sufficiently established from the facts. Since the court will undoubtedly not be experts in job grading and the allocation of value to specific types of work it may be necessary to attain expert evidence to prove the similarity of the work. A commissioner may summons a person (including an expert

¹⁶⁴³ Section 98A of the Insolvency Act 24 of 1936 creates a statutory preferential right in favour of employees for the payment of certain claims against the insolvent estate of an employer relating to arrear salaries and other employment benefits.

¹⁶⁴⁴ Section 200A(a) of the LRA Amendment Bill of 2012.

¹⁶⁴⁵ Memorandum of the Objects of the Labour Relations Amendment Bill at 28.

¹⁶⁴⁶ See the discussion regarding the application of the statutory presumption (s 200A of the LRA and s 83 of the BCEA) under 1 in Ch 1.

¹⁶⁴⁷ In principle it should be a real comparator and not a hypothetical one. See *Nombalcuse v Department of Transport & Public Works: Western Cape Provincial Government* (2013) 34 ILJ 671 (LC) at para 33. Even though this principle was applied in this matter in relation to equal pay, the same principle should apply in as far as a claim for equal benefits – which is a broader concept – is concerned.

¹⁶⁴⁸ *Capper Pass Ltd v Lawton* [1977] 2 W.L.R 26 at 30.

witness) who may be able to provide information or who holds books and documents that could assist in resolving the dispute.¹⁶⁴⁹

Establishing who is 'comparable' may not be easy. A proper factual foundation will have to be laid by a fixed term employee. In order to effectively determine whether or not an employee delivers services comparable to those of a permanent employee, information regarding the performance rendered by the comparator must be accessible. The proposed amendments do not require the employer to ensure access to the required information. Getting the required information may not be a simple feat. Information could be manipulated or withheld by employers. Employers may also suppress or destroy evidence.

To subpoena the employer may be ineffective because of the confidential nature of the information sought. This could possibly infringe upon the comparator's right to privacy.¹⁶⁵⁰ A fixed term employee would need to utilise procedures prescribed in terms of the PAIA.¹⁶⁵¹ In terms of s 63 of the PAIA personal information that is held and would be unreasonable to request need not be disclosed. However, if the information requested relates to the position and functions of an individual access can usually not be denied.¹⁶⁵² Generic details regarding post grading, salary scales, remuneration and responsibilities connected to a particular position would therefore be accessible.

The PAIA was enacted in order to give effect to s 32 of the Constitution.¹⁶⁵³ It contains its own process to be followed in order to request this information. Therefore, it is unnecessary for other legislation to also include details on how information should be accessed. A request for access to information should correspond with the requirements set out in the Regulations regarding Access to Information.¹⁶⁵⁴ The employer is then required to, usually within 30 days, provide a notification in which it either grants the

¹⁶⁴⁹ Section 142 of the LRA.

¹⁶⁵⁰ The right to privacy is recognised in s 14 of the Constitution. Since the information would be required by the fixed term employee to prove the existence of a right, the procedure prescribed in the PAIA would have to be followed in order to obtain the necessary information.

¹⁶⁵¹ As discussed in Ch 1 under 6, if there is no procedure prescribed for accessing information required for the protection of ones rights the procedure that is prescribed in this piece of legislation must be followed.

¹⁶⁵² Section 63(2)(f) of the PAIA.

¹⁶⁵³ Also see the discussion under 6 in Ch 1.

¹⁶⁵⁴ Regulation 10 of the Regulations regarding Access to Information General Notice R187 GG No. 23119 of 15 February 2002. Forms are provided which indicated the information required in Annexure B of the Regulations.

access to the required information or refuses access.¹⁶⁵⁵ If access to the information is granted, the employer must indicate in the notice how the information will be made available and what the fee is that is payable.¹⁶⁵⁶ If an employer refuses access to the information, the notification must include the reason for the refusal and notify the requester of the procedure to be followed to review the decision.¹⁶⁵⁷ Should an employer fail to respond to a request to access information, the request will be deemed as having been refused.¹⁶⁵⁸

Employers would be required to ensure that all employees' performance is evaluated. This is not currently legally required. Fixed term employees are, unlike their permanent colleagues, usually not subjected to performance appraisals. This may be a way of avoiding challenges based upon reasonable expectation by fixed term employees who are highly competent in comparison with permanent staff. Performance appraisals will have to be standardised in order to enable objective comparisons without the attainment of expert evidence. Either way, the process of comparing a fixed term work to another employee's work will be a costly exercise.

In England, the National Minimum Wage Act of 1998 provides a special mechanism for accessing records required by an employee to prove that there has been a discrepancy in the amount which he or she has been paid by the employer.¹⁶⁵⁹ Should the employer fail to produce the requested records within fourteen days after receipt of a request to access them, it is made actionable.¹⁶⁶⁰ In South Africa, the mechanisms in PAIA would have to be used since there is no specific procedure prescribed by the Labour Relations Amendment Bill. On a positive note, at least the aspect of accessing information has been tested by the courts.

¹⁶⁵⁵ Sections 56(1) & 57(1) of the PAIA.

¹⁶⁵⁶ Section 56(2) of the PAIA.

¹⁶⁵⁷ Section 56(3) of the PAIA. Sections 78 – 82 of the PAIA read with the Promotion of Access to Information Rules, General Notice R965 GG 32622 of 9 October 2009 regulates the process for applying to court for a review of a refusal.

¹⁶⁵⁸ Section 58 of the PAIA.

¹⁶⁵⁹ Section 10 of the Minimum Wage Act of 1998. See also Painter, Richard W & Holmes, Ann EM *Cases and Materials on Employment Law* 8th edn (Oxford University Press 2010) 130.

¹⁶⁶⁰ Section 11(1) of the National Minimum Wage Act of 1998.

6.4 Dismissal protection will be made subject to qualification

The LRA does not currently distinguish between employees based on seniority or status.¹⁶⁶¹ Many of the proposed provisions are subject to qualification. The Labour Relations Amendment Bill of 2012 excludes higher earning permanent employees from the unfair dismissal protection. Generally employees earning in excess of a threshold amount will be denied access to the CCMA except in cases of automatically unfair dismissal. The only requirement is that the employer must have provided at least three months' written notice or a longer period of notice as indicated in the employment contract.¹⁶⁶² If an employee is dismissed summarily or without the required notice he or she will still be able to refer an unfair dismissal dispute to the CCMA.¹⁶⁶³ These provisions will come into operation two years after the amendments have come into effect.¹⁶⁶⁴ Employers will be in a position to terminate the services of senior employees much easier. The threshold amount is instituted in recognition of the significant distinction between the bargaining power of higher paid executives and lower paid employees.¹⁶⁶⁵ Senior management could be excluded from the dismissal and unfair labour practice protection since they are in a better position to negotiate contractual protection.¹⁶⁶⁶

Higher earning employees are excluded because they are deemed to be in a better position to negotiate protection such as arbitration clauses contractually.¹⁶⁶⁷ It seems questionable whether the resultant restriction will withstand constitutional muster in terms of the limitation clause,¹⁶⁶⁸ particularly given the motivation for the amendment. The aim is to protect more vulnerable employees. Higher earning employees are presumed to be able to afford the costs of the Labour Court. The RIA of 2010 estimates that, depending on the earning threshold that is set, between 0.3 to 3.6 percent of cases referred annually will no longer be referred to the CCMA, decreasing the Commission's

¹⁶⁶¹ Section 213 of the LRA makes no distinction between various types of employees on these bases. See the discussion under 1 in Ch 1.

¹⁶⁶² Section 188(B)(2) and (a) of the Labour Relations Amendment Bill, 2012.

¹⁶⁶³ Section 188B(3) of the Labour Relations Amendment Bill of 2012.

¹⁶⁶⁴ Section 188B(5) of the Labour Relations Amendment Bill of 2012.

¹⁶⁶⁵ Memorandum of the Objects Labour Relations Bill of 2012 at 19.

¹⁶⁶⁶ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' endnote 83.

¹⁶⁶⁷ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 19.

¹⁶⁶⁸ See the discussion regarding limitation of rights in terms of the Constitution under 1.8 in Ch 1.

workload. It is hoped that by showing wealthier employees away, it will be easier to resolve disputes where less fortunate employees are concerned.¹⁶⁶⁹

When the Labour Relations Amendment Bill of 2012 eventually becomes operational, fixed term employees will seemingly have escaped the negative effects of the decisions in *Dierks* and *University of Pretoria*.¹⁶⁷⁰ However, the same group of people could possibly be excluded from the unfair dismissal protection based on the threshold amount that is set by the Minister.¹⁶⁷¹ This time the exclusion will be made more general, excluding also indefinitely appointed employees.¹⁶⁷²

Grogan indicates his discomfort with this proposed amendment. In his view, using the salary that an employee receives as measure of his or her bargaining power is an arbitrary reason for not affording the same protection against unfair dismissal to him or her. In his opinion it makes no sense to argue that someone earning a monthly salary of R19 999 should have the right not to be unfairly dismissed, but an individual earning R20 000 be denied the unfair dismissal protection. He indicates that the level of employees' skills would also be an unreliable indicator of his or her bargaining power. The rate of payment for many jobs that require a high level of skills is also not high, while certain jobs that are reserved for affiliates of certain political parties are well paid, but does not require any measure of skill. In his opinion, a person's position is most likely the most sensible measure to determine whether an employee should be denied free services if he or she is dismissed.¹⁶⁷³ Grogan opines that affected employees would be forced to resort to the dismissal protection available at common law, save in circumstances where the dismissal qualifies as automatically unfair.

The common law will, in Grogan's view, be of little assistance to challenge the fairness of a dismissal in the absence of a contractual provision requiring the employer to dismiss them fairly due to the fact that courts are bound by the decision in *SA Maritime*

¹⁶⁶⁹ RIA of 2010 at 115 & 118.

¹⁶⁷⁰ See the discussion under 5.2.1.1 – 5.3 in Ch 5.

¹⁶⁷¹ The Minister is in terms of s 188B(4) of the Labour Relations Amendment Bill of 2012 mandated to determine an amount in consultation with NEDLAC. In determining the amount, it should be considered whether or not adequate protection is provided in terms of the contract of employment. This clause will come into operation 2 years after the law is signed into force.

¹⁶⁷² Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 18 – 19.

¹⁶⁷³ Grogan, John Adv. 'What's in Store? – The Coming Amendments' (August 2012) Vol. 28 No. 4 *Employment Law Journal*.

*Safety Authority v McKenzie*¹⁶⁷⁴ which has the effect of deterring the courts from accepting that fairness may be implied into or be viewed as tacit terms in employment contracts.¹⁶⁷⁵ I agree with Grogan on all counts. Thankfully, an amendment to s 188B(4) was introduced, which requires the Minister of Labour to, among other things, consider the bargaining power of the employees when determining the threshold amount. Nevertheless, leaving it up to the Minister to make a general call will in any event lead to unfairness in some cases. Below it will be considered whether or not the setting of similar qualifications as these is accepted in other countries.

6.4.1 Qualifying period for dismissal protection

In South Africa there is currently no qualifying period before becoming entitled to the right to unfair dismissal protection. However, a six month qualifying period before the inception of dismissal protection has been proposed.¹⁶⁷⁶

A qualifying period that applies generally to employees is in line with international practice. In other jurisdictions the ordinary unfair dismissal protections which are not also automatically unfair do not apply to employees who have less than a stipulated period of service. The six month period also does not seem to be excessive considering the length of the qualifying period in the UK.

6.4.2 Exclusion of fixed term employees from the dismissal protection in other jurisdictions

In Australia, for instance, the Fair Work Act 2009¹⁶⁷⁷ and its regulations¹⁶⁷⁸ were modelled to the ILO Convention No. 158 of 1982 on Termination of Employment. It excludes fixed term employees from unfair dismissal protection as well as from the provisions pertaining to notice of termination and redundancy pay.¹⁶⁷⁹ In addition, fixed term employees are excluded from the provisions in terms of which employers are

¹⁶⁷⁴ *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

¹⁶⁷⁵ Grogan 'What's in Store? – The Coming Amendments' (August 2012) Vol. 28 No. 4 *Employment Law Journal*.

¹⁶⁷⁶ Section 188B of the Labour relations Amendment Bill of 2012.

¹⁶⁷⁷ Fair Work Act 28 of 2009.

¹⁶⁷⁸ Fair Work Regulations Select Legislative Instrument No. 112 of 2009 dated 18 June 2009.

¹⁶⁷⁹ Section 123 of the Fair Work Act 28 of 2009.

required to consult with trade unions prior to the implementation of retrenchment procedures.¹⁶⁸⁰

However, fixed term employees who are appointed in terms of contracts that stipulate that it is possible to terminate the contract by notice and who have worked for the requisite period of time, are not so excluded.¹⁶⁸¹ Premature termination of a fixed term contract where no notice period is provided for, will also be actionable under the unfair dismissal provisions. Fixed term employees will also enjoy protection against unfair dismissal if the contract was found to be substantially aimed at avoiding the unfair dismissal provisions.¹⁶⁸² If an employer created a reasonable expectation of employment whether the expectation is one of a further fixed term appointment or continuous employment, a fixed term employee will also, under certain circumstances, be covered by the dismissal legislation.¹⁶⁸³ In Portugal it is likewise possible to waive or modify the legislative principles applicable to fixed term contracts by means of collective agreements.¹⁶⁸⁴

Certain classes of employees working for small businesses are sometimes excluded from the operation of the dismissal provisions.¹⁶⁸⁵ In Australia the Small Business Fair Dismissal Code applies to employers employing fewer than fifteen full-time employees came into operation on 1 July 2009.¹⁶⁸⁶ Some exemptions are made regarding dismissal requirements for these 'small business employers'. They are not obliged to pay redundancy pay.¹⁶⁸⁷ Employees working for small business employers also cannot claim to have been dismissed within the first year of their appointment. This is different to the protection provided for employees working in larger enterprises: They can claim

¹⁶⁸⁰ Section 534(1)(a) of the Fair Work Act 28 of 2009.

¹⁶⁸¹ Creighton B and Stewart A *Labour Law: An Introduction* 3rd edn (The Federation Press 2000) 319. See for instance *Cooper v Darwin Rugby League Inc* (1994) 1 IRCR 130; *Anderson v Unbakumba Community Council* (1994) 1 IRCR 247 and *Esam & Organ v SPC Ardmona Operations Ltd* (2005) 56 AILR 100-345 (16).

¹⁶⁸² Section 386(3) of the Fair Work Act 28 of 2009. See also Regulation 3.2 of the Workplace Relations Regulations (Amendment) No. 101 of 1997 accessed at http://www.austlii.edu.au/au/legis/cth/num_reg_es/wrr1997n101436.html (21 March 2013).

¹⁶⁸³ See for instance *D'Lima v Board of Management of Princess Margaret Hospital for Children* (1995) AILR 3-173. See also *Minister of Health v Ferry* (1996) 65 IR 374.

¹⁶⁸⁴ Article 139 of the Labour Code 7 of 2009.

¹⁶⁸⁵ See for instance s 170CC(1)(e)(ii) of the Australian Workplace Relations Act of 1996 which excludes employees where the application of the provisions would cause substantial problems because of the 'size or nature of the undertakings in which they are employed'. See also regs 4 and 30BAA of the amended Workplace Relations Regulations. These excluded employees may nevertheless have a remedy under State Law.

¹⁶⁸⁶ This Code was established pursuant to s 388(1) of the Fair Work Act 28 of 2009.

¹⁶⁸⁷ Section 121(1)(a) of the Fair Work Act 28 of 2009.

based on unfair dismissal after only six months of employment. After the first year of employment, small business employers must adhere to the requirements as set out in the Small Business Code in order to dismiss an employee. A dismissal that accords with the principles as contained in the Code will be deemed to be fair.¹⁶⁸⁸

In Austria employees working for employers who employ five or less employees are excluded from the protection against unfair dismissal.¹⁶⁸⁹ In France enterprises that employ ten or fewer employees are exempted from certain of the procedural and substantive requirements set for dismissals.¹⁶⁹⁰ In Italy enterprises employing fifteen or fewer employees are excluded from certain unfair dismissal remedies. In the agriculture sector the exclusion only applies to employers employing less than five workers.¹⁶⁹¹ In Portugal employers employing fewer than ten employees are exempted or placed under different rules regarding disciplinary dismissals.¹⁶⁹² In Turkey, enterprises employing 30 or fewer employees are excluded from the dismissal provision. Such employers are not required to provide a valid reason to terminate an employment contract.¹⁶⁹³ The Spanish Workers' Statute¹⁶⁹⁴ also exempts small businesses with fewer than 25 employees from the application of several of its unfair dismissal provisions.¹⁶⁹⁵

Therefore, it is not contrary to international practice for South Africa to exclude small or newly formed employers from the application of dismissal protection. It is also not, in international terms, uncommon to exclude managerial employees or senior officials from the operation of unfair dismissal protection.¹⁶⁹⁶ In Sweden, workers in managerial or executive positions are for instance excluded from the operation of the dismissal protection.¹⁶⁹⁷ Portugal also excludes managerial or executive employees from the operation of some or all of the unfair dismissal provisions as contained in the Labour

¹⁶⁸⁸ Section 23 of the Fair Work Act 28 of 2009. These exclusions are generally based on the nature of the employment relationship.

¹⁶⁸⁹ Section 40(1) Works Constitution Act of 14 December 1973, as last amended in December 2010 (BGBl No. 111 of 2010) (Arbeitsverfassungsgesetz).

¹⁶⁹⁰ Article L 1235 – 5 of the Labour Code (Code du Travail).

¹⁶⁹¹ Article 35 of Act No. 223 on collective dismissal is only applicable to undertakings employing more than 15 workers.

¹⁶⁹² Article 358(1) of the Labour Code 7 of 2009.

¹⁶⁹³ Article 18 of the Labour Act No. 4857 of 2003.

¹⁶⁹⁴ *Estatuto de los trabajadores* of 1995 Royal Decree 1 of 1995 as last amended on 17 September 2010 by the Labour Market Reform, Act No. 35/2010 (*Ley de medidas urgentes para la reforma del mercado de trabajo*).

¹⁶⁹⁵ Articles 14, 33(8) and 51(4) of the *Estatuto de los trabajadores* of 1995.

¹⁶⁹⁶ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 19.

¹⁶⁹⁷ Section 1 of the Employment Protection Act of 1982.

Code. In addition, in the Labour Code, there are specific rules applicable to the termination of employment of senior managers.¹⁶⁹⁸

South Africa deviates from the normal prescribed dismissal procedures in as far as senior and executive employees are concerned. Higher standards of performance and competence are expected of senior managerial employees than of ordinary employees.¹⁶⁹⁹ Employers are, for instance, not expected to provide the same degree of counselling regarding the skills and standards of performance that is expected before dismissing senior employees.¹⁷⁰⁰

6.5 Potential effects of the proposed legislation

South Africa's Legislature has proposed strict regulation of fixed term and atypical employment where, as it stands, fixed term employment is currently to a large degree unregulated. Whether or not stricter regulation will provide more job security to these vulnerable employees remains volatile ground. What follows is an exposé of the different views expressed regarding possible positive and negative consequences of the proposed legislation.

6.5.1 A possible decrease in new appointments or retrenchments

Stricter regulation could have very adverse consequences on the labour market. Instead of achieving its intended outcome, the amendments to the legislation may exacerbate the unemployment problem and stifle job creation and economic growth. Employers are less inclined to employ new employees if it becomes too difficult to dismiss employees. This is regarded as one of the main thrusts towards informalisation of the marketplace.¹⁷⁰¹

¹⁶⁹⁸ Article 392 of the Labour Code 7 of 2009.

¹⁶⁹⁹ Grogan *Employment Rights* (2010) 39. See also *Van Aarde v Sanlam* 1994 3 LCD 375 (IC); *Long & another v Chemical Specialities TVL (Pty) Ltd* (1987) 8 ILJ 523 (IC) at 523J and *Oak Industries (SA) (Pty) Ltd v John NO & another* (1987) 8 ILJ 756 (N) at 756J. *Brereton v Bateman Industrial Corporation Ltd & others* [2000] 5 LLD 119 (IC) at 120 and *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* [2000] 1 BLLR 1 (LAC) at para 76.

¹⁷⁰⁰ *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* at para 76.

¹⁷⁰¹ Benjamin & Gruen 'The Regulatory Efficiency of the CCMA: A Statistical Analysis' at 6.

6.5.2 Evasion of legislation

In order to establish the suitability of new proposed legislation, a prediction should be made as to how effective it would be if it is placed in the hands of bad people. It is not inconceivable that employers, who are subjected to stricter regulation, would avoid appointing fixed term employees unless they can somehow manage to evade the legislation. In England, for instance, the enactment of legislation lengthening the notice periods for termination of employment and requiring the payment of severance pay, contributed to a net increase in unemployment. Stricter regulation also reduced new appointments.¹⁷⁰²

Employers may be discouraged from employing more employees as a result of the increased financial risks and administrative burdens associated with temporary employment. But, if the regulation of permanent employment is relaxed, employers may feel less of a need to appoint employees on a temporary basis. This seems to be what the legislature is hoping for.

6.5.3 Increased cost to business and more onerous administrative burden for employers

To provide equal benefits for fixed term employees may be very expensive. It is impossible to ascertain from the data that is available exactly what the cost to business will be in order to comply with the new proposed provision. It has been estimated that the cost of employing fixed term employees on the same terms as permanent employees could result in an increase in costs of employment of between five and 102 percent.¹⁷⁰³ In a BUSA-analysis, it is estimated that about 215150 jobs will be lost as a consequence of the equal benefits requirement.¹⁷⁰⁴ The objections raised against regulation clearly evidence that, currently, fixed term employment is generally associated with lower labour costs for employers, low salaries, no or limited benefits and poor working conditions.

¹⁷⁰² Andrews M & Nickel S 'Unemployment in the UK Since the War' *Review of Economic Studies* in Greenhalgh C, Layard R & Oswald A (eds) *The Causes of Unemployment* (Oxford University Press 1983) 731 - 759.

¹⁷⁰³ De Waal Jean-Marie in *Beeld* 26 July 2012 at 26.

¹⁷⁰⁴ BUSA 'Submission to parliament on labour amendment' accessible at http://www.busa.org.za/docs/25%20July%20BUSA_submission_to_parliament_on_labour_amendments_28_June_2012.pdf (22 August 2012).

Providing equal benefits such as pension funds could be impractical for fixed term employees who are appointed for very short periods. The proposed pro-rata system for the calculation of 'equal benefits' that fixed term employees will be entitled to after six months, is very useful. From a practical point of view, the limited nature of fixed term appointments may necessitate the loading of fixed term employees' rates of pay, instead of providing certain benefits, in order to avoid unnecessary administrative burdens.

The same treatment clause¹⁷⁰⁵ could lead to more permanent contracts, but it may also lead to an increase in unemployment. If someone is going to work for longer than six months, there would be little advantage to be gained by employing him or her on a fixed term basis rather than indefinitely. A permanent contract can be terminated by giving notice at any time.¹⁷⁰⁶ From an administrative point of view it may also be more convenient to employ someone permanently.

The only benefit attached to a fixed term appointment would be that no notice would have to be provided for termination, if the circumstances do not suggest continuation of the employment relationship. In the absence of circumstances that suggest continuation, a fixed term contract could also contribute to certainty regarding the temporary nature of the appointment.

The probationary-type clause creates a justifiable exception for unfair treatment within the initial six month period. Employers could dismiss fixed term employees during the first six months leaving them without recourse.

The increase in the costs to do business could have devastating effects on struggling businesses and ultimately lead to their closure. Job opportunities may decrease in number if employers are forced into mechanisation of their processes. Consequently, the proposed amendments could threaten the viability and sustainability of businesses.

6.5.4 Degradation of the benefits received by permanent employees

Employers may become less generous when granting benefits to permanent employees. The BCEA, for instance, provides that employees are entitled to unpaid

¹⁷⁰⁵ Section 198B(8) of the Labour Relations Amendment Bill of 2012.

maternity leave. Many employers however contractually provide for payment during maternity leave. Employers may be less inclined to make such payments if they are required to pay the same amount to the person standing in temporarily.

6.5.5 More job security for fixed term employees

The provision of security of employment is recognised as a core principle of labour law.¹⁷⁰⁷ Fixed term employees are under a higher risk of losing their jobs. Persons employed in terms of successive fixed term contracts could go through intermittent spells of unemployment. In other words, fixed term employees are more prone to unemployment. Certain fixed term employees currently enjoy limited job security because of the fact that those who expect indefinite appointment are not covered by the legislation.¹⁷⁰⁸ Workers will be afforded protection against unfair dismissal and gain employment security and access to benefits such as medical aid and pension fund benefits.

6.5.6 Improved productivity

Employment protection measures in some other jurisdictions have contributed to the promotion of employment stability and improved productivity. Unfair dismissal protection often promotes competitiveness as employers are obliged to invest in the development of skills and in so doing, to enhance productivity.¹⁷⁰⁹ On the other hand, strict labour policies may hamper entrepreneurial spirit and the development of new enterprises.¹⁷¹⁰

¹⁷⁰⁶ Grogan John *Workplace Law* (2009) at 42.

¹⁷⁰⁷ In *Mtshamba & others v Boland Houtnywerhede* (1986) 7 ILJ 536 (IC) at 573H – 574H the Industrial Court commented that job security and continuity of employment is fundamental to most employment relationships. See also *National Chemsearch (SA) v Borrowman & another* 1979 (3) SA 1092 (T) at 1107B – C. For a general discussion on job security see Hepple 'Security of Employment' in *Blanpain Comparative Labour Law and Industrial Relations* (Deventer & Kluwer 1982) at 473 *et seq.*

¹⁷⁰⁸ See the discussion under 3 in Ch 5.

¹⁷⁰⁹ Felstead & Jewson *Global Trends in Flexible Labour* (1999) at 3 & 9.

¹⁷¹⁰ Felstead & Jewson *Global Trends in Flexible Labour* (1999) at 9. The openness and variety of flexible work resulted in access to the labour market of people who were previously excluded therefrom, such as women with young children. Flexible labour associated with atypical employment has been recognised as integral to the process of globalisation and strengthening of developing economies in countries like Hong Kong and Taiwan.

6.5.7 Arbitrary exclusion from dismissal protection

All employees, whether they are appointed indefinitely or in terms of fixed term contracts, who earn above the threshold amount or who have not worked for an employer for six months, will be left completely remediless should the employer dismiss them unfairly in the absence of a contractual arrangement. To avoid being subjected to the legislation, employers may pay wages that slightly exceed the threshold amount. This would, taken into account the cost of litigation, probably be a more cost effective method. The exclusion based on level of earnings fails to consider the magnitude of the phenomenon of single-headed households in the country. Even if someone earns in excess of whatever it is that may be prescribed as the threshold amount, many unemployed household members may be reliant upon such a person's income.¹⁷¹¹ The RIA of 2010 does not consider this aspect at all.

Another concern is that, despite the fact that in the RIA of 2010 it is indicated that high earning employees would still be able to refer their disputes to the Labour Court, no entry mechanism allowing for such an application to the Labour Court is provided for in terms of the LRA.

This provision, despite its discriminatory nature, does meet South Africa's international law obligations. As noted, South Africa has not ratified the ILO Convention No. 158 of 1982 regarding Termination of Employment. Even if it had ratified this Convention, it is still in terms of its provisions possible to exclude certain categories of employees from the dismissal protections¹⁷¹² if adequate safeguards are maintained to protect them against exploitation.¹⁷¹³ Arguably the existence of constitutional remedies¹⁷¹⁴ excludes the need for any further regulation.

Section 198 of the Labour Relations Amendment Bill of 2012 also excludes certain fixed term employees from its operation. Section 198A, 198B and 198C only cover

¹⁷¹¹ Vettori Stella *Ageing Populations and Changing Labour Markets* (Gower Publishers 2010) at 195 – 200.

¹⁷¹² Clause 5 of Convention No. 158 of 1982 on Termination of Employment provides that member states may exclude 'limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of particular conditions of employment of the workers.'

¹⁷¹³ As mentioned art 3 of the ILO Convention No. 158 of 1982 on Termination of Employment of 1982 and art 3 of the ILO Recommendation No. 166 of 1982 on Termination of Employment require signatories to provide adequate safeguards to prevent the circumvention of the protections. Since the dismissal protection is a component of the right to fair labour practices as guaranteed in the Constitution, dismissal protection must be provided.

employees who earn less than the stipulated amount. The proposed amendments in the Labour Relations Amendment Bill of 2012 are predominantly aimed at the protection of lower-paid employees.¹⁷¹⁵ Since the ILO Convention No. 158 of 1982 on Termination of Employment provides for the exclusion of specific categories of employees, it could be argued that, not applying the unfair dismissal protection to professional employees would also not be a contravention of South Africa's international obligations.¹⁷¹⁶

This does not, in my opinion, justify depriving employees of their right not to be unfairly dismissed. The amendment will have significant cost implications for higher-paid employees. Denying employees the right to refer a dispute based on the level of their earnings is an infringement of their constitutional right to fair labour practices, equality and right to refer a dispute. Whether the restriction of these rights is justifiable taking into consideration the reasons for the limitation is debatable. The proposed provisions appears to be vulnerable to constitutional challenge as there are other less restrictive means of addressing the concerns that are expressed.¹⁷¹⁷

6.5.8 Avoiding an imminent poverty trap

Using contract work in circumstances where it is not justified and exploitation of fixed term employees cannot be allowed to continue simply because employers are, in doing so, allowed to save. The cost of providing fixed term employees with the same employment security and benefits as indefinitely appointed employees should not be considered in isolation. There is a broader dimension to labour market regulation.¹⁷¹⁸ In the provision of rights and protections to fixed term employees, other objectives of labour market policy should be considered as well. The impact of the proposed legislation needs to be measured by its effect on economic growth, the level of unemployment and the capacity of government departments to implement and enforce

¹⁷¹⁴ Section 38 of the Constitution.

¹⁷¹⁵ Memorandum of the Objects Labour Relations Bill of 2012 at 21.

¹⁷¹⁶ Clause 5 of Convention No. 158 of 1982 on Termination of Employment. See also the Committee of Experts 'General Survey on Protection Against Unjustified Dismissal' 1995 International Labour Office at paras 66 – 68.

¹⁷¹⁷ Section 36 of the Constitution.

¹⁷¹⁸ Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 *Industrial Law Journal* 666 at paras 5 & 13. Governments and policy makers should in making legal reforms, do so comprehensively and not limit considerations only to specific objectives to be achieved.

regulatory requirements.¹⁷¹⁹ Labour protection and particularly, employment security protection often come at a cost.

The effects of not regulating fixed term employment could be devastating. The vast majority of the country's citizens are living in poverty. Inequality remains rife. The statistics evidence a poverty trap.¹⁷²⁰ Low paid workers often neglect family health and education. Without intervention, future generations may also be doomed to poverty. Except for these social costs, the inevitable economic costs that will ensue should not be ignored. The limited provision of pension benefits and medical aid has the negative result that fixed term employees and their families are more insecure and exposed to risk. The burden on the state of providing social and health protection is increased.¹⁷²¹

6.5.9 The labour system would become less flexible

Labour market flexibility is often regarded as necessary for job creation.¹⁷²² The Constitutional Court in *NUMSA & others v Bader Bop (Pty) Ltd & another*¹⁷²³ cautioned against 'setting in constitutional concrete principles which may become obsolete or inappropriate as social and economic conditions change.'

Whether or not a more flexible labour approach to labour market regulation would benefit South Africa in the sense that it would promote job creation and create an environment conducive to employment growth is unclear. The experience in other jurisdictions may be instructive in this regard. By deregulating its labour system and lowering labour standards, Asia successfully gained a foothold in the international market. In OECD countries where flexible labour legislation was implemented, it had a positive effect on the employment rates.¹⁷²⁴

¹⁷¹⁹ Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' at para 140.

¹⁷²⁰ See the discussion under 3 in Setting the scene.

¹⁷²¹ ILO 'Global Wage Report, Africa Brief 2010/2011' at 23.

¹⁷²² Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' at paras 2 – 3.

¹⁷²³ *NUMSA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC) at 307.

¹⁷²⁴ The World Bank 'Cost of Doing Business Survey' 2006 accessed at <http://www.doingbusiness.org/MethodologySurveys/Accessed?> (5 November 2012).

However, by lowering labour standards productivity may be prejudiced.¹⁷²⁵ In Germany the Act on Advancing Employment of 1985¹⁷²⁶ was, for instance, instituted in order to deregulate fixed term employment.¹⁷²⁷ The object of the deregulation was to create more job opportunities by no longer requiring objective grounds for the conclusion of fixed term contracts. There was nevertheless no clear evidence of any positive effect on the employment rate in this country.¹⁷²⁸ In Germany, stricter regulation of fixed term employment was reported to have had a positive effect on productivity.¹⁷²⁹

Degradation of employment standards would not necessarily lead to more jobs or to a lower rate of unemployment. In Spain, the workforce is segregated into standard and non-standard work. Deregulation of fixed term work exacerbated the unemployment and poverty problem in this country. It aggravated the precariousness of employment in that country.¹⁷³⁰ In Australia, the rise of fixed term employment as a result of deregulation resulted in a decline in standard employment.¹⁷³¹

South African unfair dismissal protections are often cited as being of the most inflexible systems in the world.¹⁷³² However, South Africa is actually currently at a fairly standard level of regulation and at the lower end of the spectrum in as far as regulation of fixed

¹⁷²⁵ Van Niekerk 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper' (Development Policy Research 2007) at 5 - 6.

¹⁷²⁶ *Beschäftigungs-förderungsgesetz* of 1985.

¹⁷²⁷ For a discussion of the restrictions that were previously applied in Germany under the Bürgerliches Gesetzbuch see Olivier 'Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent developments' 1025 – 1026.

¹⁷²⁸ Waas Bernd 'Labour Policy and Fixed Term Employment Contracts in Germany' 'Labour Policy on Fixed Term Employment Contracts' – 2010 Japan Institute for Labour Policy and Training Comparative Labour Law Seminar at 25.

¹⁷²⁹ Footnote 81 of the ILO 'Informal background note for the participants to consultations on Convention No. 158 and Recommendation No. 166' (2008) accessed at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_100768.pdf (18 October 2012).

¹⁷³⁰ Anuedo-Dorantes Catalina & Serrano-Padial Ricardo 'Fixed-term employment and its poverty implications: Evidence from Spain *Focus* Vol. 23 No. 3 Spring 2005 42 - 45. See also Milner S, Metcalf D & Nombela G 'Employment Protection Legislation and Labour Market Outcomes in Spain' London: Centre for economic performance (London School of Economics 1995) 38 accessed at <http://eprints.lse.ac.uk/20746/> (12 August 2012).

¹⁷³¹ Felstead & Jewson *Global Trends in Flexible Labour* (1999) at 128.

¹⁷³² The latest World Economic Forum Global Competitiveness Report ranked South Africa 40th out of 119 countries as far as competitiveness is concerned, but 115th for flexibility in appointment and termination of employment. South Africa was ranked 106th for flexibility in wage determination. According to the World Economic Forum's Global Competitiveness Index for 2010/2011 South Africa is ranked 135th out of the 139 countries surveyed for hiring and firing practices. South Africa was 131st for flexibility of wage determination and rated 112th for pay and productivity.

term employment is concerned. In fact, the only countries cited with a less regulated system for temporary workers were the UK and the United States.

The table below indicates the data which was updated until 2010.¹⁷³³

Country	Protection of permanent workers against (individual) dismissal	Regulation on temporary forms of employment	Specific requirements for collective dismissal	OECD employment protection index
Australia	1.37	0.79	2.88	1.38
Austria	2.19	2.29	3.25	2.41
Belgium	1.94	2.67	4.13	2.61
Canada	1.17	0.22	2.63	1.02
Czech Republic	3.00	1.71	2.13	2.32
Denmark	1.53	1.79	3.13	1.91
Estonia	2.27	2.17	3.25	2.39
Finland	2.38	2.17	2.38	2.29
France	2.60	3.75	2.13	3.00
Germany	2.85	1.96	3.75	2.63
Greece	2.28	3.54	3.25	2.97
Hungary	1.82	2.08	2.88	2.11
Italy	1.69	2.54	4.88	2.58
Korea	2.29	2.08	1.88	2.13
Luxembourg	2.68	3.92	3.88	3.39
Netherlands	2.73	1.42	3.00	2.23
New Zealand	1.54	1.08	0.38	1.16
Norway	2.20	3.00	2.88	2.65
Portugal	3.51	2.54	1.88	2.84
Slovak Republic	2.45	1.17	3.75	2.13
Slovenia	2.98	2.50	2.88	2.76
South Africa	1.91	0.58	1.88	1.35
Spain	2.38	3.83	3.13	3.11
Sweden	2.72	0.71	3.75	2.06
Switzerland	1.19	1.50	3.88	1.77
Turkey	2.48	4.88	2.38	3.46
UK	1.17	0.29	2.88	1.09
US	0.56	0.33	2.88	0.85

In order to get an idea of whether South Africa's fixed term component of about thirteen percent¹⁷³⁴ is high or low, some statistics of other countries are considered. Only about 3.3 percent of the Estonian workforce was appointed in terms of contracts of limited duration in 2012.¹⁷³⁵ In the US, less than 4.2 percent of workforce is appointed under

¹⁷³³ OECD 'Employment protection in OECD and selected non-OECD countries, 2008' accessed at <http://www.oecd.org/els/emp/onlineoecdemploymentdatabase.htm#epl> (20 March 2013). This table was last updated in September 2010. Unfortunately no further updates are available.

¹⁷³⁴ See the discussion under Setting the scene.

¹⁷³⁵ Eurostat 2nd trimester 2012.

fixed term contracts.¹⁷³⁶ In the UK, only approximately 6.2 percent of the workforce is appointed in terms of limited duration contracts, while about seven percent of the Slovakian workforce and 7.1 of the workforce in Luxembourg work under fixed term contracts.¹⁷³⁷

The labour force statistics indicate that about 8.3 percent of the Belgian workforce was appointed in terms of limited duration contracts. About 8.5 percent of Czech workers and 8.8 percent of Danish workers are appointed in terms of contracts of limited duration. In Hungary approximately 8.9 percent of the workforce is appointed under fixed term contracts. About 9.6 percent of the Austrian workforce is appointed under employment contracts of limited duration. Persons appointed under limited duration contracts accounted for approximately 11.6 percent of the Greek workforce and 12.3 percent of the Turkish workforce. In Switzerland about 12.9 percent of workforce is appointed for a fixed term. About 13.4 percent of the Italian workforce and 13.7 percent of the Canadian workforce is engaged on a fixed term basis. Likewise, about 13.7 percent of the Japanese workforce is appointed on fixed term contracts.

In Germany about 14.7 and in France 15.3 percent of the workforce was estimated to be appointed in terms of fixed term contracts of employment. Roughly 16.4 percent of the Swedish workforce is appointed in terms of limited duration contracts.¹⁷³⁸ About 17.1 percent of the labour force in Finland and 18.2 percent of the Slovak Republic's workforce is appointed in terms of a fixed term contract.¹⁷³⁹ In the Netherlands about 18.4 percent of the workforce is appointed under limited duration contracts. In Spain there is a very high incidence of fixed term appointments. It was estimated that 25.3 percent of the total workplace is temporarily employed.¹⁷⁴⁰

In the US, where an employee may be dismissed for any or no reason at all, fixed term employees relative to indefinitely appointed workers, enjoy more job security.

¹⁷³⁶ OECD publishing 'OECD Outlook 2012' Incidence of temporary employment 2012 Percentages' accessed at <http://stats.oecd.org/Index.aspx> (21 March 2013). These statistics are based on the following definition of temporary worker: 'Temporary employees are wage and salary workers who have a pre-determined termination date as opposed to permanent employment whose job is of limited duration.'

¹⁷³⁷ Eurostat 2nd trimester 2012.

¹⁷³⁸ Eurostat 3rd trimester 2012.

¹⁷³⁹ Eurostat 2nd trimester 2012.

¹⁷⁴⁰ OECD publishing 'OECD Outlook 2012' Incidence of temporary employment 2012 Percentages' accessed at <http://stats.oecd.org/Index.aspx> (21 March 2013). These statistics are based on the following definition of temporary worker: 'Temporary employees are wage and salary workers who have a pre-determined termination date as opposed to permanent employment whose job is of limited duration.'

Consequently fixed term employees form only a small segment of the American labour force.¹⁷⁴¹ In the UK, permanent employees also enjoy weak dismissal protection¹⁷⁴² In the absence of a 'non-redundancy clause' in the contract of employment, an employer may dismiss an employee for any or no reason, subject only to the payment of a statutory redundancy fee.¹⁷⁴³ Fixed term employees also only account for a small segment of the labour force in that country.¹⁷⁴⁴

Although Spain is rated as having stricter dismissal regulation than South Africa, the country has a very high prevalence of fixed term employment.¹⁷⁴⁵ Spain is also the European country with the highest turnover of employed persons who hold a job for less than twelve months. The dual system that developed in Spain therefore detracted from job security and also of alleviation of skills since employers are often less inclined to invest in human capital of temporary employees.¹⁷⁴⁶

To diminish the protection against unfair dismissal for permanent employees does not necessarily mean that employers will be more inclined to appoint individuals indefinitely rather than on fixed term contracts. However, by allowing the abuse of fixed term employment to cause segmentation in the workplace, job security may be compromised even more.

6.5.10 A new regulatory impact assessment should be performed

It is difficult to predict what the effect of the new amendments will be. The changes that were introduced in 2002 regarding employment protection for domestic workers¹⁷⁴⁷ and

¹⁷⁴¹ Waas Bernd 'Labour Policy and Fixed-Term Employment Contracts in Germany' in the JILP Report 'Labour Policy on Fixed Term Employment Contracts' – 2010 Japan Institute for Labour Policy and Training Comparative Labour Law Seminar at 23.

¹⁷⁴² Deakin S & Morris G *Labour Law* 5th edn (Oxford: Hart Publishing 2009) at 445.

¹⁷⁴³ Barnard C & Deakin S 'Chapter 7: United Kingdom' in Caruso B & Sciarra S (eds) *Flexibility and Security in Temporary Work: A Comparative and European Debate* (2007 WP CSDLE 'Massimo D'Antona' INT 56/07).

¹⁷⁴⁴ As indicated, only about 4.7% of the labour force was appointed under limited duration contracts in 2011 according to the OECD statistics.

¹⁷⁴⁵ As previously indicated according to the 2012 data about 25.3% of the Spanish workforce is temporarily employed.

¹⁷⁴⁶ Toharia Luis 'The Emergence of Fixed-Term Contracts in Spain and their Incidence on the Evolution of Employment' Paper presented at the Fondazione Rodolfo De Benedetti Conference in Rome 1999 at 2, 9, 12 – 15 & 17. See also Anuedo-Dorantes Catalina & Serrano-Padial Ricardo 'Fixed-term employment and its poverty implications: Evidence from Spain *Focus* Vol. 23 No. 3 Spring 2005 at 42 - 44.

¹⁷⁴⁷ A sectoral determination was issued determining minimum wages for all domestic workers in Government Notice No. R1068 in GG No. 23732 of 15 August 2002).

farm workers were much on the same grounds, highly contested and predicted to bring about job losses. But, they were implemented without the anticipated detrimental economic effect.¹⁷⁴⁸ On the other hand, a new minimum wage for farm workers was announced on 4 February 2013.¹⁷⁴⁹ Employers contested the introduction of the mandatory R105 per day very strongly, but it nevertheless came into operation. Even before the new minimum wage was implemented, farmers started retrenching thousands of farm workers.¹⁷⁵⁰ Evidently, without a proper assessment of the cost of providing equal benefits to fixed term employees, implementing these new measures could negatively impact on employment and the limited job security that, especially uneducated, fixed term employees currently enjoy.¹⁷⁵¹

6.6 Practical aspects

Legislative protection is only as effective as the enforcement mechanisms. If the rights are not enforced properly, they serve no purpose and might as well not be included in the legislation.¹⁷⁵²

The CCMA or a bargaining council having jurisdiction are mandated to conciliate and, if necessary, to arbitrate disputes arising from the interpretation or application of the newly proposed provisions.¹⁷⁵³ But, the CCMA is already overburdened by the high number of referrals. Bargaining councils and private arbitration agencies have not lessened the CCMA's case load significantly as intended.¹⁷⁵⁴ Declining union membership as a result of growing levels of atypical employment is a threat to the

¹⁷⁴⁸ Blaauw PF & Bothma LJ (2010) 'The impact of minimum wages for domestic workers in Bloemfontein, South Africa' *SA Journal of Human Resource Management/ SA Tydskrif vir Menslikehulpbronbestuur* 8(1) Art #216 accessed at <http://www.sajhrm.co.za> (8 November 2013).

¹⁷⁴⁹ See the SA News media report accessed at <http://www.sanews.gov.za/south-africa/minister-announces-new-minimum-wage-farmworkers> (22 March 2013).

¹⁷⁵⁰ See the SA News media report accessed at <http://www.citypress.co.za/business/2-000-farm-workers-retrenched-ahead-of-new-minimum-wage-implementation/> (22 March 2013).

¹⁷⁵¹ See the discussion under 3 in Setting the scene.

¹⁷⁵² An example is the 1983 amendment to the Labour Relations Act of 1956 in terms of which labour brokers were required to register with the Department of Labour. Since this provision was never enforced, it was left out in the current LRA. Thereon Jan 'Employment is Not What It Used to Be' (2003) 24 *Industrial Law Journal* 1247 at 1265.

¹⁷⁵³ Section 198D(1) and (2) of the LRA Amendment Bill of 2012 determines that the CCMA has jurisdiction to entertain disputes referred in terms of ss 198A, 198B and 198C.

bargaining council system. Accredited bargaining councils often lack adequate resources and capacity in order to reduce the CCMA's burden.¹⁷⁵⁵

New amendments to the LRA are proposed with the specific purpose of making the mechanisms of enforcing arbitration awards more effective and to streamline the dispute resolution and enforcement procedures.¹⁷⁵⁶ A commissioner's arbitration award will be final and binding and enforceable as if it were a Labour Court order, unless it is an advisory award.¹⁷⁵⁷ A party may address failure to comply with a certified arbitration award other than for the payment of money by way of contempt proceedings in the Labour Court against the party against whom the order was made.¹⁷⁵⁸

If a party is ordered to pay an amount of money to the other party in terms of an arbitration award, the execution processes prescribed for use in the Magistrate's court will be used.¹⁷⁵⁹ The amendment to the LRA will require the CCMA to pay the deposit to the Sheriff on behalf of the employee.¹⁷⁶⁰ Fixed term employees will no longer be prevented from receiving compensation due to them, because they cannot afford to pay the Sheriff. Therefore, this amendment promotes access to social justice.

However, where arbitration awards are made that does not involve payment of an amount of money, it will prove to be more complicated. If an employer, for instance, is ordered to re-instate an employee and the employer fails to comply, the only means of enforcement would be a formal court motion. Also currently there is no procedure prescribed, or provision made for assistance of employees who are contemplating instituting such contempt proceedings against recalcitrant employers.¹⁷⁶¹

The CCMA will need to establish a new department to deal with this function. The CCMA would incur additional costs relating to salaries. The South African dispute resolution system is currently not equipped to ensure compliance and proper

¹⁷⁵⁴ Bhorat & Cheadle 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' at 32. See also Friedman S, Levy A, Mischke C & Venter T *Tokiso Dispute Settlement 2010 Review 2009 - 2010* (2010) at 20 - 21.

¹⁷⁵⁵ ILO 'NEDLAC Republic of South Africa Decent Work Country Programme 2010 to 2014' (29 September 2010) at 17.

¹⁷⁵⁶ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 13.

¹⁷⁵⁷ Section 143(1) of the Labour Relations Amendment Bill of 2012.

¹⁷⁵⁸ Section 143(4) of the Labour Relations Amendment Bill of 2012.

¹⁷⁵⁹ Section 143(5) of the Labour Relations Amendment Bill of 2012.

¹⁷⁶⁰ RIA of 2010 at 102.

¹⁷⁶¹ Vettori Stella 'Enforcement of Labour Arbitration Awards in South Africa' (2013) 25 *SA Merc LJ* 245 at 251 *et seq.*

enforcement of even the current legislation. Whether the CCMA will be capable of dealing with the increased workload resultant from the new causes of action that are being introduced, is questionable.

6.6.1 Means testing to establish eligibility

In order to establish whether or not a fixed term employee would qualify for the protection that is proposed in the Labour Relations Amendment Bill of 2012, a means test will need to be performed. Different from the means test used for purposes of assessing whether someone qualifies for social assistance from the State, what is to be considered is a fixed term employee's remuneration. Means testing as eligibility measure has proven very unsuccessful in as far as social security grants are concerned. The state departments are not equipped to deal with the administrative burdens caused by the means requirement and the system is susceptible to fraud and corruption.¹⁷⁶² There is no substance in arguing that the position will be any different in the already overburdened CCMA.

Fixed term and part-time work raises a number of extra considerations. Part-time workers are paid for the work performed and fixed term workers may have intermittent spells of unemployment, making it difficult to ascertain what a fixed term employee's income is. In addition, fixed term employees are normally not prevented from doing other work while appointed on a fixed term basis. In other words, a fixed term employee may have more than one source of income which he or she may not wish to disclose, because it would place his or her cumulative income above the threshold amount and outside of the protection provided by the legislation.

No procedure is provided for, in the Labour Relations Amendment Bill of 2012, regarding the proof of income in assessing eligibility. It is submitted that due to the intrinsic complications in fixed term employment as mentioned above, an assessment of income or means test would require close corroboration with the South African Revenue Service to ensure full disclosure. This should assist the CCMA in preventing an influx of matters related to eligibility assessment. Nevertheless, the process would be time-consuming and the CCMA would need to establish a new department that deals

exclusively with eligibility assessment. This measure remains impractical and is in my opinion not economically viable.

Notably, both the proposed legislation and the IRA of 2010 are silent on this issue. As a prescribed procedure is fundamental to the enforcement and ultimate efficiency of the proposed provisions, it is suggested that this is a material aspect which should be addressed in the legislation.

6.6.2 Part-time or fixed term protection

In the UK, there is specific legislation to ensure equal treatment of men and women in employment.¹⁷⁶³ A procedure is prescribed to ascertain whether work of equal value is performed by a man and a woman.¹⁷⁶⁴ Work will be deemed as equivalent if the opposite sex comparator performs work which is considered broadly similar and if the differences between the respective employees' work are immaterial.¹⁷⁶⁵ Regard must be had to the frequency of any differences that may exist in practice¹⁷⁶⁶ as well as the nature and extent of any differences in the terms of their employment.¹⁷⁶⁷ If employees are evaluated and ranked, two employees who are ranked at the same level in respect of the demands that the employer makes will be considered as performing work of equal value.¹⁷⁶⁸ As it is not legally required for employers to rank employees in this way, an employment tribunal may request independent experts to draft reports.¹⁷⁶⁹

The European Council Directive 1999/70/EC of 28 June 1999 was formulated to prevent abuse of fixed term contracts in situations that better suit permanent employment and to ensure that fixed term employees are not treated less favourably than indefinitely employed workers. This directive was made operational in the UK by means of regulations.¹⁷⁷⁰ These regulations have been operational since 10 October 2002. The aim of their introduction was to ensure that there is no disparity in treatment between

¹⁷⁶² Vettori Stella (ed) *Ageing Populations and Changing Labour Markets* (Gower 2010) at 199. See also Olivier MP, Smit N and Kalula ER *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban 2003) at 163.

¹⁷⁶³ Section 66 of the Equality Act of 2010.

¹⁷⁶⁴ This process is set out in Part 5 of Ch 3 of the Equality Act of 2010.

¹⁷⁶⁵ Section 65(2)(a) and (b) of the Equality Act of 2010.

¹⁷⁶⁶ Section 65(3)(a) of the Equality Act of 2010.

¹⁷⁶⁷ Section 65(3)(b) of the Equality Act of 2010.

¹⁷⁶⁸ Section 65(4)(a) of the Equality Act of 2010.

¹⁷⁶⁹ Section 130 of the Equality Act of 2010.

¹⁷⁷⁰ Fixed Term Employees (Less Favourable Treatment) Regulations of 2002. Painter Richard W & Holmes Ann *EM Cases and Materials on Employment Law* 8th edn (Oxford University Press 2010) at 45.

fixed term employees and comparable indefinitely appointed employees, unless it can be objectively justified.

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations are also aimed at preventing the abuse of successive fixed term appointments.¹⁷⁷¹ The similarities between the stipulations in the proposed Labour Relations Amendment Bill 2012 and the regulations pertaining to fixed term employees that are used to provide job security in the UK, are uncanny. Therefore, it serves as a good comparative to look at the way in which these regulations have been applied in the UK since 2002.

In terms of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations, fixed term employees who perform broadly similar work and having similar skills and qualifications, may compare their employment conditions to permanent employees working for the same employer.¹⁷⁷²

In order to utilise this remedy, it would have to be proven that the employee was, in fact, a fixed term employee. In *Allen v National Australia Group Europe Ltd*¹⁷⁷³ the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002 were applied. In this matter, the contract contained a provision allowing for early termination of the fixed term employee's contract by notice. The Employment Appeal Tribunal decided that the inclusion of a clause enabling either party to terminate the contract prior to the agreed upon termination date, would not make the agreement something other than a fixed term contract. The parties had, in the Tribunal's view, intended that the agreement would be seen through to the agreed upon date, unless there was an event which was 'not in the normal course.'¹⁷⁷⁴

It may happen that a fixed term appointment is converted into one which is part-time.¹⁷⁷⁵ In such a case, a person may no longer qualify as a fixed term employee. He or she would be required to bring an application under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.¹⁷⁷⁶ In the UK, equal treatment of part-time workers is required, unless objective reasons for disparate treatment can be

¹⁷⁷¹ Lewis, Sargeant & Schwab *Employment Law: The Essentials* (2011) at 54.

¹⁷⁷² Regulation 2 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.

¹⁷⁷³ *Allen v National Australia Group Europe Ltd* [2004] IRLR 847 EAT.

¹⁷⁷⁴ *Allen v National Australia Group Europe Ltd* at para 32.

¹⁷⁷⁵ See for instance *Brown v Knowsley Borough Council* [1986] IRLR 102 EAT.

¹⁷⁷⁶ Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000(SI 2000/1551).

provided. In the absence of an acceptable reason for treating a fixed term employee differently to a comparable permanent employee he or she would be, calculated on a pro-rata basis, entitled to the same payment, pension benefits, leave entitlements and access to training, as the indefinitely employed comparator.¹⁷⁷⁷ If less favourable treatment is granted in order to affect a sound business objective, it would be justified.¹⁷⁷⁸

It has been decided that, in determining whether or not a part-time worker is doing the same or similar work as a full-time employee, the focus should be on the similarities of the services rendered by the respective employees rather than on the differences. The core functions that the two employees perform must be compared.¹⁷⁷⁹

Although both fixed term and part-time employees are provided with protection, there are two distinct sets of regulations for the respective types of employees in the UK. This means that a choice needs to be made whether the case is referred as either a fixed term employee or a part-time employee. The same principle will probably apply in South Africa when the Labour Relations Amendment Bill of 2012 becomes operational.

An employee in South Africa, wishing to rely upon the new equal treatment provision, will need to claim as either a part-time employee or as a fixed term employee. This will depend on how he or she is paid. For purposes of the provision providing for equal treatment of part-time employees that earn less than the prescribed threshold amount,¹⁷⁸⁰ a part-time employee is defined as an employee who is paid for the hours in which he or she works and who does not work full-time.¹⁷⁸¹ In order to establish whether a person is part-time, his or her working hours would be measured against those of a comparator. If a person works fewer hours than a full-time employee, he or she would be a part-time employee. If the wrong choice is made when referring the dispute, it would be possible for an employer to use the fact that the employee is not fixed term or part-time, as a defence.

¹⁷⁷⁷ Regulations 2 - 4 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551). See also *Carl v University of Sheffield* [2009] IRLR 616 at paras 9, 14 – 17, 23, 35 & 49 – 50 where the EAT held that an actual comparator is required instead of a ‘hypothetical’ one.

¹⁷⁷⁸ Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551).

¹⁷⁷⁹ See *Matthews v Kent & Medway Towns Fire Authority & others* [2006] IRLR 367 at paras 39 – 41, 51 & 58 for an application of this principle.

¹⁷⁸⁰ Section 198C of the Labour Relations Amendment Bill of 2012.

¹⁷⁸¹ Section 198C(1)(a) of the Labour Relations Amendment Bill of 2012.

For purposes of the application of the regulations, it is not required that the worker's status must be the only reason for the discriminatory treatment. If being part-time, for instance, is only one of the reasons why he or she is being treated less favourably than a permanent employee, the regulations may nevertheless be relied upon.¹⁷⁸² Therefore, it would suffice to show that a fixed term employee was discriminated against based on his or her employment status. It is not required like in South Africa currently, to link the discrimination claim to another ground or to prove that such other ground is the most proximate reason for the discriminatory treatment.¹⁷⁸³

Sometimes, the costs associated with the provision of a benefit to a fixed term employee would be disproportionate to the benefit that the fixed term employee would receive. This could render it objectively fair to treat the fixed term employee differently. If, for example, a comparable permanent employee enjoys the use of a company car, a fixed term employee who is appointed for three months may be accommodated in his or her travelling needs in a different, less expensive way.¹⁷⁸⁴ To prevent a claim based on unfair treatment, an employer could also provide up-front rewards for benefits that are not provided rendering the terms no less favourable over-all. An employer can raise a sound reason why a particular benefit had not been provided to the fixed term employee or justify the action by showing that the total package of terms and conditions of employment is no less favourable than those of a comparable permanent employee.¹⁷⁸⁵

If a fixed term employee is dismissed because he or she had exercised any right under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) it would constitute an unfair dismissal. The same principle applies in respect of a termination of a part-time employee's employment for reasons of exercising a right in terms of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551).¹⁷⁸⁶ South Africa has not introduced a comparable mechanism in respect of the new provisions in particular. But, s 187 of the LRA already protects employees against prejudicial conduct as a result of the enforcement of their rights in terms of the LRA.

¹⁷⁸² *Sharma v Manchester City Council* [2008] IRLR 336 at paras 57 - 58. See also *Carl v University of Sheffield* [2009] IRLR 616 which followed a similar approach.

¹⁷⁸³ See the discussion under 3 in Ch 1.

¹⁷⁸⁴ Painter & Holmes *Cases and Materials on Employment Law* 8th edn (Oxford University Press 2010) at 93.

¹⁷⁸⁵ Painter & Holmes *Cases and Materials on Employment Law* (2010) at 94.

6.6.3 Proving continuity in employment

The Labour Relations Amendment Bill of 2012 sets a six month qualification period before a fixed term employee would be able to claim entitlement to equal treatment.¹⁷⁸⁷ In addition, the provision regarding the payment of severance pay to certain fixed term employees is conditional. Only those fixed term employees who have worked for the employer for two continuous years will be entitled to severance pay.¹⁷⁸⁸

Unscrupulous employers could attempt to prevent claims, by either appointing fixed term employees for periods of less than six months or two continuous years, by creating interruptions in employment. Since this is the first time that a qualification period will be used in South Africa as an eligibility criterion, the practical application of this principle requires consideration. The way in which similar provisions have been applied in the UK is instructive.

In the UK, if a fixed term employee had upon termination worked for an employer for two years or longer and the circumstances fall within the scope of the definition of a redundancy, he or she will be entitled to a statutory redundancy payment. In calculating the period of employment, only weeks wherefore the employee has a contract of employment, count towards continuous employment.¹⁷⁸⁹ In the absence of a contract of employment an interruption in employment is created. Continuity is conserved during periods of sick leave, holiday leave and other statutory leave.¹⁷⁹⁰ If there is a break of two or more clear weeks between fixed term appointments the continuous service will be interrupted. However, if there is a temporary cessation of work or if there is an arrangement or custom in the workplace in terms of which the fixed term employee is regarded as continuing as an employee despite the absence of a contract of employment, continuation will not be interrupted.¹⁷⁹¹

¹⁷⁸⁶ Lewis & Sargeant with Schwab *Employment Law: The Essentials* (2010) at 493.

¹⁷⁸⁷ Section 198B(8) of the Labour Relations Amendment Bill of 2012.

¹⁷⁸⁸ Section 298(b)(10) of the Labour Relations Amendment Bill of 2012.

¹⁷⁸⁹ Section 212(1) Employment Rights Act of 1996. Previously s 197 of the Employment Rights Act determined that fixed term employees could exclude their rights to redundancy payments by agreement. Section 18(1) of the Employment Relations Act of 1999 repealed this provision. The possibility to waive redundancy pay was finally done away with by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.

¹⁷⁹⁰ Section 212(3)(a) Employment Rights Act of 1996.

¹⁷⁹¹ Section 212(3)(b) of the Employment Rights Act of 1996.

The Labour Relations Amendment Bill of 2012 also requires the conclusion of a written fixed term contract.¹⁷⁹² Therefore, the court could, like in the UK require the existence of a contract before employment will be regarded as being continuous.

In *Ford v Warwickshire County Council*¹⁷⁹³ a teacher was employed in terms of a fixed term contract which lasted for the length of the academic term. The teacher was not appointed during the summer holiday. For a number of years the teacher was re-employed at the start of the new autumn term, each time on the same terms. After several years, the employer decided not to renew the teacher's contract. Consequently, the fixed term employee referred an unfair dismissal dispute for resolution. The employer argued that the teacher did not have more than one year's continuous services, because each summer holiday caused a break in the continuity of her services. The House of Lords held that the summer holidays constituted a temporary cessation in the employer's activities and did not constitute an interruption in the continuity of the fixed term employee's work.¹⁷⁹⁴

In the UK, if there is an arrangement or custom under which the employee is treated as being continuously employed despite the absence of a contract of employment, a break in employment will be disregarded.¹⁷⁹⁵ However, if an employer allows an employee to take a period of long term unpaid leave, but agrees with him or her that when the leave is over he or she can return to work, it could nevertheless, depending on the circumstances constitute an interruption in the continuity of employment.¹⁷⁹⁶

In *Booth v United States of America*¹⁷⁹⁷ the Employment Appeal Tribunal also considered the exception to the requirement of continuity of employment. In this case, the applicants, maintenance workers employed by the US army on UK bases, were appointed on a series of fixed term contracts with gaps in between them. The employer's intention was to avoid unfair dismissal claims by causing interruptions in the employment. The employees argued that the gaps should be ignored, because when they returned after the breaks they received the same employment number, the same tools and clothing etc. They claimed that the breaks were an arrangement or custom.

¹⁷⁹² Section 198B(6) of the Labour Relations Amendment Bill of 2012.

¹⁷⁹³ *Ford v Warwickshire County Council* [1983] 2 A.C. 71.

¹⁷⁹⁴ *Ford v Warwickshire County Council* at paras 84C - F & 85 A - D.

¹⁷⁹⁵ Section 212(3)(c) Employment Rights Act of 1996.

¹⁷⁹⁶ See for instance *Curr v Marks & Spencer plc* [2003] IRLR 74 CA at para 41 - 44 & 55.

The Employment Appeal Tribunal disagreed. It held that if the employer was able to arrange its affairs in order to avoid the dismissal legislation, it could do so. It was the tribunal's view that an arrangement or custom required prior discussion or agreement. In this case the employees were required to re-apply for their positions after each break. Consequently, there had been no agreement to the effect that they would be re-employed thereafter.¹⁷⁹⁸

It is unclear from the wording of the proposed provision in the Labour Relations Amendment Bill of 2012 whether or not the same principle will be applied in South Africa. However, it is suggested that, with the introduction of a qualification period, all past employment under the same employer should also be taken into account. The BCEA indicates that when assessing the length of an employee's employment for purposes of the rights conferred therein, previous employment should be considered as long as any break in employment subsists for a period shorter than one year.¹⁷⁹⁹ This provision regarding the continuity of service further supports the view that interruptions caused as a result of custom and practice and the exercise of rights would not prevent a fixed term employee from claiming that he or she had been continuously employed for the qualification period.¹⁸⁰⁰

It must be kept in mind that the reason why the new provisions in protection of fixed term employees is introduced in South Africa, is in recognition of the abuse suffered by fixed term employees and to prevent exploitation.¹⁸⁰¹ Employers who follow exploitative practices and abuse fixed term contracts would conceivably try to find ways in which to circumvent the legislative provisions. From the wording of the new provision, it remains possible to cause interruptions in employment that may place fixed term employees beyond the protection that is envisaged by the legislature. As South African courts often turn to English decisions in case of uncertainty, fixed term employees should nevertheless enjoy protection in terms of the proposed provision despite interruptions, if the gaps in employment were intended to avoid coverage by the legislation.

¹⁷⁹⁷ *Booth v United States of America* 1998 WL1043238.

¹⁷⁹⁸ *Booth v United States of America* at 3.

¹⁷⁹⁹ Section 84(1) of the BCEA.

¹⁸⁰⁰ Section 84(2) of the BCEA.

¹⁸⁰¹ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 1.

6.6.4. Employers will have to provide objective reasons for a fixed term appointment or renewal

Currently, South African employers are not legally required to conclude written contracts with fixed term employees. In addition, they need not provide a reason for appointing a fixed term employee on a temporary basis or for renewing the contract. The Labour Relations Amendment Act of 2012 will change this in a dramatic way when it comes into operation.

A fixed term contract will have to be concluded in writing.¹⁸⁰² In addition, any subsequent offer of renewal will also have to be put in writing.¹⁸⁰³ Both the contract and any possible subsequent offer of renewal must indicate the reasons for the temporary appointment instead of an indefinite one.¹⁸⁰⁴ In proceedings an employer will bear the onus of proving that there was a justifiable reason for appointing the fixed term employee temporarily and that it was agreed that the employment would continue for a fixed term.¹⁸⁰⁵

But as mentioned,¹⁸⁰⁶ the BCEA already requires the provision of written particulars of a fixed term appointment.¹⁸⁰⁷ Despite this obligation, employers often do not comply. A letter of appointment from the human resources department also usually is not formulated as a contract. Clearly, the enforcement mechanisms to ensure compliance become of key importance.

There is no stipulation regarding the enforcement of the requirement as contained in s 198B(6) in the Labour Relations Amendment Bill of 2012. If an employer fails to comply with the new provision, fixed term employees would most likely only request written particulars indicating the reason for a fixed term appointment once the employment relationship has begun to deteriorate. Under such circumstances, employers are provided with leeway to formulate a reason which may not have existed upon the initial appointment.¹⁸⁰⁸

¹⁸⁰² Section 198B(6) of the Labour Relations Amendment Bill of 2012.

¹⁸⁰³ Section 198B(6)(a) of the Labour Relations Amendment Bill of 2012.

¹⁸⁰⁴ Section 198B(6)(b) of the Labour Relations Amendment Bill of 2012.

¹⁸⁰⁵ Section 198B(7) of the Labour Relations Amendment Bill of 2012.

¹⁸⁰⁶ See the discussion under in Ch 1 under 1.2.4.

¹⁸⁰⁷ Section 29(1) of the BCEA.

¹⁸⁰⁸ See the discussion in Ch 3 under 2.1.

It is not made an actionable offense if an employer fails to provide reasons to a fixed term employee for his or her appointment on a temporary basis. It would be sensible to provide a remedy to a fixed term employee if an employer fails to provide the required particulars indicating the reasons for the fixed term contract in the contract itself. Fixed term employees who are unable to claim in terms of the unfair dismissal protection in the LRA would then still be able to claim based on a breach of contract and employers would not be able after the fact, to find new reasons. If an employer wishes to appoint employees on a fixed term basis reasons would be required for doing so.

South African employers will be obliged to justify fixed term appointments for periods exceeding six months. It would be reasonable to use this type of appointment in circumstances where the nature of the work is of a limited duration or if there is another justifiable reason.¹⁸⁰⁹ The amendment bill determines that it would be justified to appoint someone for longer than six months if the fixed term employee is:

- standing in for another employee who is absent from work temporarily;¹⁸¹⁰
- appointed to assist as a result of a temporary increase in work which is not expected to endure for longer than twelve months;¹⁸¹¹
- is a student or someone who has recently graduated who is appointed to gain experience;¹⁸¹²
- appointed to do a specific defined task of a limited or defined duration;¹⁸¹³
- engaged for a trial period of no longer than six months to determine his or her suitability for employment;¹⁸¹⁴
- a non-citizen with a work permit for a defined period;¹⁸¹⁵
- engaged to perform seasonal work;¹⁸¹⁶
- engaged on an official public works scheme or similar public job creation scheme;¹⁸¹⁷

¹⁸⁰⁹ Section 198B(3) of the Labour Relations Amendment Bill of 2012.
¹⁸¹⁰ Section 198B(4)(a) of the Labour Relations Amendment Bill of 2012.
¹⁸¹¹ Section 198B(4)(b) of the Labour Relations Amendment Bill of 2012.
¹⁸¹² Section 198B(4)(c) of the Labour Relations Amendment Bill of 2012.
¹⁸¹³ Section 198B(4)(d) of the Labour Relations Amendment Bill of 2012.
¹⁸¹⁴ Section 198B(4)(e) of the Labour Relations Amendment Bill of 2012.
¹⁸¹⁵ Section 198B(4)(f) of the Labour Relations Amendment Bill of 2012.
¹⁸¹⁶ Section 198B(4)(g) of the Labour Relations Amendment Bill of 2012.
¹⁸¹⁷ Section 198B(4)(h) of the Labour Relations Amendment Bill of 2012.

- engaged in a position which is funded by an external source for a limited period;¹⁸¹⁸
- the normal or agreed retirement age.¹⁸¹⁹

This list is not intended to be exhaustive. If the reason for keeping a fixed term employee employed in terms of a fixed term contract is not for one of these reasons, it will be deemed an indefinite appointment after six months.¹⁸²⁰ The factors indicated as justifiable reasons for differential treatment¹⁸²¹ indicate that a fixed term employee will, by virtue of the status of his or her employment, be entitled to protection against abuse and arbitrary discrimination. This is, in my view, a very necessary and positive development.

Where fixed term contracts are concluded or renewed in contradiction of this, it will be deemed to be of an indefinite duration. This will counter the practice of abuse by employing fixed term employees indefinitely while affording them no security and denying them benefits that the worker would otherwise have been entitled to.

The explanatory memorandum determines that if a fixed term employee is engaged to work on a specific task for a specific period this would be sufficient justification.¹⁸²² Therefore, the use of fixed term contracts will be restricted. Employers would be able to use this clause as a defence against an unfair dismissal claim by a fixed term employee if the employer is capable of demonstrating a fair reason for the fixed term appointment.

6.6.4.1 A shift in the evidentiary burden

The effect of requiring objective reasons for renewal of a fixed term contract is that the evidentiary burden has effectively shifted to the employer if a dispute is referred based on unfair dismissal in terms of s 186(1)(b) of the LRA. If a fixed term employee should challenge the fairness of his or her dismissal, the employer will have to prove that it was

¹⁸¹⁸ Section 198B(4)(i) of the Labour Relations Amendment Bill of 2012.

¹⁸¹⁹ Section 198B(4)(j) of the Labour Relations Amendment Bill of 2012.

¹⁸²⁰ Section 198B(5) of the Labour Relations Amendment Bill of 2012. See also the Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 25.

¹⁸²¹ Section 198D(3) of the LRA Amendment Bill of 2012.

¹⁸²² Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 21 – 22.

fair to appoint the fixed term employee temporarily in the first place.¹⁸²³ This is, in my opinion, the correct approach. If there was a fair reason for the termination of the fixed term employee's employment, there would be no need to pursue the matter any further. Time consuming interlocutory procedures in which the employer requests a declaratory order that the employee was not dismissed would be prevented.¹⁸²⁴

However, there is an evident flaw in the proposed provision. The Explanatory Memorandum provides that employers could justify employing someone on a fixed term basis if he or she was appointed to work on a specific task or to stand in for someone else. An employer could also appoint someone for a task that is restricted to a specified period.¹⁸²⁵ In other words, the fact that a contract which is concluded makes the person a fixed term employee would be sufficient to justify appointment on a fixed term basis where after the evidentiary burden would revert back to the fixed term employee. It is still not at this stage required to provide written reasons for the actual termination of the fixed term employee's employment. Due to the fact that the courts are generally reluctant to interfere with employers' decisions¹⁸²⁶ the shift of evidentiary burden may bring very little practical relief for fixed term employees who claim based on an alleged unfair dismissal.

6.6.4.2 Reason for the conclusion of a fixed term contract in other jurisdictions

Currently in South Africa, the reason for the conclusion of a fixed term contract only becomes relevant if a claim is referred in terms of s 186(1)(b) of the LRA. On the other hand, the rationale for concluding the fixed term contract is at the forefront of the enquiry regarding the fairness of termination of a fixed term contract in some jurisdictions.

In New Zealand employers are, for instance, required to provide material reasons for the conclusion of fixed term contracts.¹⁸²⁷ Genuine reasons or reasonable grounds must

¹⁸²³ Section 198B(7) of the Labour Relations Amendment Bill of 2012 determines that if in any proceedings it is required, the onus rests on the employer to prove that there was a justifiable reason for appointing the applicant on a fixed term contract and also that the term of the engagement had been agreed upon.

¹⁸²⁴ See the discussion regarding possible jurisdictional aspects which may be raised during conciliation and arbitration in Ch 4 under 4.1.

¹⁸²⁵ Memorandum of the Objects of the Labour Relations Amendment Bill of 2012 at 25.

¹⁸²⁶ See the discussion of employers' business prerogative and review thereof under 1.2 in Ch 1.

¹⁸²⁷ Section 66(2) of the Employment Relations Act 24 of 2000.

exist for resorting to the use of fixed term employments and a fixed term employee must be advised when or how his or her employment will end and reasons must be provided to justify termination. It will not constitute material grounds if a fixed term contract is abused so as to exclude or limit the statutory rights, or instead of a period of probation, to establish whether or not an employee is suitable for permanent appointment.¹⁸²⁸

Likewise, in Finland fixed term appointments are only allowed in case of temporary replacement, traineeships and for specific tasks.¹⁸²⁹ In Denmark, fixed term appointments are usually made in the professional services and construction sectors. In France, fixed term contracts may be used to appoint temporary replacements, for seasonal employment and where there is a temporary influx in workload.¹⁸³⁰ Italy restricts the use of fixed term contracts to instances where it is required for the employer's technical, production or organisational purposes.¹⁸³¹ In Germany, employers are required to provide justification for fixed term appointments. In the absence of satisfactory reasons, a contract will be considered as being of indefinite duration. However, if the term of the appointment is shorter than two years no reasons are required.¹⁸³² Within two years an employer may renew a fixed term contract up to three times.¹⁸³³ For fledgling enterprises the time limit is four years instead of two. In addition, no justification is required for the appointing someone who has reached the age of 52 years on a fixed term basis.

Portugal restricts the use of fixed term contracts to instances where businesses are starting up, for long-term unemployed persons or for first-time job seekers.¹⁸³⁴ In Slovenia, fixed term appointments are only permissible for replacement purposes, project work or for the appointment of managers and also in instances provided for in

¹⁸²⁸ Section 66(3) of the Employment Relations Act 24 of 2000.

¹⁸²⁹ Section 3 of Ch 1 of the Employment Contract Act 55 of 2001. A new s 3(3) dealing with successive fixed term contracts was also introduced on 1 January 2011 in terms of Act 1224/2010. This provision reads: 'The use of consecutive employment contracts is not permissible when the number of fixed-term contracts or their duration as a sum or their sum show that the employer's need for a work force is long-term.'

¹⁸³⁰ See article L 1242-2 of the Labour Code (Code du travail).

¹⁸³¹ Article 10 of the Legislative Decree 368/2001. This legislation does not apply to the tourism and agricultural sectors. In addition fixed term contracts concluded with executive employees are expressly excluded.

¹⁸³² Section 14(1) of the Part-Time and Fixed-Term Employment Act of 2000.

¹⁸³³ Section 14(2) of the Part-Time and Fixed-Term Employment Act 2000.

¹⁸³⁴ Article 140(1) of the Labour Code 7 of 2009. Article 140(2) contains a non-exhaustive list of circumstances in which employers may use fixed term contracts.

collective agreements.¹⁸³⁵ Sweden restricts the use of fixed term contracts to use for purposes of temporary replacements, seasonal work and for appointment of persons beyond retirement age.¹⁸³⁶

In Estonia, the Employment Contracts Act¹⁸³⁷ created a presumption in favour of indefinite appointment. Fixed term contracts may be concluded for up to five years if there are sound reasons related to the nature of the work, a temporary increase in work or if the appointment is made for the performance of seasonal work. Fixed term contracts are also permitted for reasons of temporary replacement of absent employees. In addition, if the work performed by a fixed term employee qualifies as temporary agency work, an employment contract may be entered into for a specified term.¹⁸³⁸

In some countries, reasons are required for the renewal of a fixed term contract. In Austria, a renewal without objective reasons therefore would automatically convert the fixed term contract into an indefinite one. Fixed term contracts may be renewed in Greece only if it is justified by an objective reason. The nature of the employer's activities and requirements that is specifically provided for in the fixed term contract would be sufficient justification.¹⁸³⁹ In Hungary,¹⁸⁴⁰ objective reasons must also be provided for the renewal of a fixed term contract. The Danish legislation¹⁸⁴¹ refers to 'objective criteria such as reaching a specific date, completing a specific task or the occurrence of a specific event' as reasons for the termination of a fixed term contract. As for successive renewals, an employer should consider not renewing fixed term contracts repeatedly 'as a result of prescribing a term that is shorter than necessary in light of the purpose of employing the worker based on such labour contract.'¹⁸⁴²

In some countries, objective reasons are required for both appointments in terms of fixed term contracts as well as for their renewal. In Slovakia, valid reasons are required

¹⁸³⁵ Article 52 (1) Employment Relationship Act 42 of 2002 as amended in 2007 by the Act No. 103/07.

¹⁸³⁶ Section 5 Employment Protection Act of 1982 as amended in July 2007.

¹⁸³⁷ The Employment Contracts Act of 2009 (RT I 2009).

¹⁸³⁸ Article 9 of the Employment Contracts Act of 2009.

¹⁸³⁹ Article 669(2) of the Civil Code Presidential Decree 456 of 1984.

¹⁸⁴⁰ A fixed term contract which is renewed without a 'rightful interest' on the employer's part and aimed at compromising the employee's interest is deemed to be of an indefinite duration. Section 79(4) Labour Code Act No. XXII of 1992.

¹⁸⁴¹ Section 1(4) of the Employers' and Salaried Employees (Legal Relationship) (Consolidation) Act No. 642 of 28 June 1996.

¹⁸⁴² Section 17(2) of the Labour Contract Act of 2007.

for any fixed term contract exceeding three years.¹⁸⁴³ Valid reasons include replacement of an employee during her absence while on statutory leave, during temporary incapacity or an employee who has been granted long term leave to perform a public function or trade union function; the performance of work in which it is necessary to significantly increase the number of employees for a transitional period not exceeding eight months per calendar year; seasonal work for shorter than eight months per year; the performance of work agreed in a collective agreement. A further extension or renewal of an employment relationship for a fixed term of up to three years or over three years can be also agreed with a teacher in higher education or a creative employee in science, research or development if there are objective reasons relating to the character of the activities of the teacher in higher education or creative employee in science, research or development as stipulated in special regulation.¹⁸⁴⁴

In Turkey, certain 'objective situations' for the conclusion of fixed term contracts exist, in particular seasonal and agricultural work. In the absence of material reasons for the renewal of a fixed term contract the contract is deemed to be indefinite.¹⁸⁴⁵ Likewise, in Spain the circumstances for using and renewing fixed term contracts are restricted. Objective and material reasons will be present if an employer can prove that there is a temporary increase in workload. The period of a fixed term appointment resulting from this reason is limited to six months annually unless there is a worker's union agreement which can extend the maximum length to eighteen months.¹⁸⁴⁶ Another objective and material reason would be if someone is appointed for a specific project. Although the length or the appointment could, in such cases, be uncertain, the duration of the appointment would be viewed as limited through the nature of the specific project or service. A fixed term employee could also be appointed to stand in for someone else. The person for whom he or she is standing in is entitled to come back after his or her leave. Fixed term appointments are also permissible for training purposes, employment of workers with disabilities and replacement of workers who are close to retirement age.¹⁸⁴⁷

¹⁸⁴³ Section 48(4) of the Labour Code No. 311 of 2001 as amended by Act 257 of 2011.

¹⁸⁴⁴ Section 48(6) of the Labour Code No. 311 of 2001.

¹⁸⁴⁵ Article 11 of the Labour Act 4857 of 2003.

¹⁸⁴⁶ Article 15(1)(b) of the *Estatuto de los trabajadores* of 1995.

¹⁸⁴⁷ Article 15(1)(c) of the *Estatuto de los trabajadores* of 1995.

Clearly, it would be in line with international practice for South Africa to require employers to provide a reason when appointing someone for a fixed term instead of permanently and for renewing fixed term contracts. Many of the reasons justifying appointment on a fixed term basis correspond with the grounds of justification for the conclusion of a fixed term contracts in other countries.

6.6.4.3 Provision of reasons for dismissal

Currently, South African employers are not required to provide reasons for not renewing a fixed term contract or for not offering continuance in employment, unless a dispute based on unfair dismissal is referred.¹⁸⁴⁸

In some other jurisdictions, employers are required to provide a written statement of reasons upon appointment or, if it is requested by the fixed term employee. In Spain, employers are, for instance, required to provide an employee with written notification of the reasons for the dismissal.¹⁸⁴⁹

Likewise, in the UK, employees are entitled to written reasons for their dismissal upon request after working for an employer for a year or longer. Employees who are dismissed while they are pregnant or on maternity or adoption leave are automatically entitled to a written statement of reasons without having to request it regardless of their length of service.¹⁸⁵⁰

Although the BCEA determines that written notice of termination should be provided to employees prior to termination of their employment, fixed term employees are generally in practice not provided this courtesy.¹⁸⁵¹ The Labour Relations Amendment Bill of 2012 does not require a written statement of reasons either. It would have been sensible to include such a requirement as it would limit the scope for employers to conjure up other reasons for not renewing a fixed term contract after the fact¹⁸⁵² and limit the scope of disputes. However, unless properly enforced, this would not assist either. Employers could provide reasons (even in writing) that are not genuine, for instance as in

¹⁸⁴⁸ Section 188 of the LRA.

¹⁸⁴⁹ Article 53(1)(a) of the *Estatuto de los trabajadores* of 1995.

¹⁸⁵⁰ Section 92 of the Employment Rights Act of 1996.

¹⁸⁵¹ See the discussion of the rights enjoyed in terms of the BCEA in Ch 1 under 1.2.4.

*Motshalibane and Fischer Tube Technic (Pty) Ltd.*¹⁸⁵³ In this case the employer stated in its written reasons for termination, that the fixed term contract simply expired whereas, the evidence proved that the fixed term employee had in actual fact been retrenched.¹⁸⁵⁴ Nevertheless, from the discussion above it is clear that to require South African employers to justify termination of fixed term contracts would be in line with international practice.

6.6.5 Maximum duration of fixed term appointments in other jurisdictions

In some jurisdictions, the total contracting period for fixed term appointments are restricted or a presumption of indefinite employment is utilised to prevent abuse of fixed term contracts in circumstances that better suits indefinite employment.¹⁸⁵⁵

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations, 2002¹⁸⁵⁶ in the UK, determine that, after four continuous years of employment, a fixed term appointment is automatically converted into a permanent appointment.¹⁸⁵⁷ But, this does not apply to all fixed term appointments. If a fixed term contract period exceeding four years can be justified on objective grounds, or a collective agreement extends the appointment, a fixed term contract will not become permanent after the four year period.¹⁸⁵⁸

In Italy, a single renewal is allowed for fixed term contracts concluded for periods of less than three years.¹⁸⁵⁹ The maximum cumulative duration of a fixed term appointment is restricted to three years.¹⁸⁶⁰ However, further renewals are permissible if authorised by the Direzione Provinciale Del Lavoro.¹⁸⁶¹ The three year limitation only applies in

¹⁸⁵² See the discussion under 3.2.1 in Ch 3.

¹⁸⁵³ *Motshalibane and Fischer Tube Technic (Pty) Ltd* (2004) 25 ILJ 1793 (BCA).

¹⁸⁵⁴ *Motshalibane and Fischer Tube Technic (Pty) Ltd* at 1800.

¹⁸⁵⁵ Also see Benjamin, Borat & Van der Westhuizen 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010' at 26.

¹⁸⁵⁶ The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations, 2002 SI 2034 of 2002. Accessed at <http://opsi.gov.uk/> (7 October 2012).

¹⁸⁵⁷ Regulation 8(2)(a) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.

¹⁸⁵⁸ Regulation 8(2)(b) and 8(5) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.

¹⁸⁵⁹ Article 4 of Legislative Decree 368 of 2001.

¹⁸⁶⁰ Article 4 Legislative Decree 368 of 2001.

¹⁸⁶¹ Article 4 *bis* of the Legislative Decree 368 of 2001 as inserted by s 40 of Act 247 of 2007.

situations where a series of fixed term contracts are concluded and does not apply to a single fixed term contract.

The Portuguese legislation restricts the number of successive renewals permitted as well as the cumulative duration of fixed term appointments. If a fixed term contract is concluded for a specific term, it may only be renewed three times.¹⁸⁶² Fixed term contracts concluded for an uncertain term may not continue for longer than six years.¹⁸⁶³ The maximum cumulative duration of successive fixed term contracts is generally limited to three years. However, depending on the reason for the conclusion of the fixed term contract other time frames may apply. If, for instance, the person appointed under the fixed term contract has been unemployed for a long period of time, the maximum cumulative duration is two years and for first time work seekers, the maximum is eighteen months.¹⁸⁶⁴

In Finland, there is no statutory limitation on the cumulative duration of successive fixed term contracts. However, consecutive contracts without justification will be considered as indefinitely valid.¹⁸⁶⁵

In terms of Slovakian legislation, the maximum number of successive fixed term contracts is limited to four. The general rule is that the cumulative duration of successive contract is limited to three years. However, a further extension or renewal without providing objective reasons is possible, if the fixed term employee is substituting somebody who is on statutory leave or on leave to perform a public or trade union function, or if the work is necessary to increase employee numbers and for a period not exceeding eight months or is seasonal work for no longer than eight months in a year, or has been agreed to in terms of a collective agreement.¹⁸⁶⁶

¹⁸⁶² Article 148(1) of the Labour Code 7 of 2009.

¹⁸⁶³ Article 148(4) of the Labour Code 7 of 2009.

¹⁸⁶⁴ Article 148(1) of the Labour Code 7 of 2009.

¹⁸⁶⁵ Section 3(2) Ch 1 of the Employment Contract Act 55 of 2001. Section 3 of ch 1 of the Employment Contract Act 55 of 2001 has been amended by Act No. 1224/2010 which came into force on 01 January 2011. A new sub-section (3) regarding successive fixed term contracts has been added. This provision determines that it is impermissible to use fixed term appointments where the duration of consecutive appointments indicate a permanent need in the employer's workforce.

¹⁸⁶⁶ Section 48(2) of the Labour Code No. 311 of 2001 as amended by Act 257 of 2011.

In Switzerland, the Code of Obligations¹⁸⁶⁷ determines that if a fixed term contract is tacitly renewed, the appointment becomes indefinite. In Belgium, four consecutive fixed term contracts of a minimum duration of three years that in total length does not exceed two years, is permitted. Employers are also allowed to contract fixed term employees for a maximum of three years if the length of the initial contract exceeds six months, if the social and labour inspectorate allows it.¹⁸⁶⁸ In the Czech Republic, the use of fixed term contracts is generally restricted to two years.¹⁸⁶⁹ In Japan, a fixed term contract may not be concluded for more than three years except if the purpose of the appointment is the completion of a specified task. The maximum duration of five years is allowed when highly specialised employees are appointed or the fixed term employee is 60 years or older in age.¹⁸⁷⁰

Only one renewal of a fixed term contract is allowed in France.¹⁸⁷¹ The general maximum duration of a fixed term appointment is eighteen months. Depending on the nature of the work, it may vary between nine and 24 months.¹⁸⁷² In Greece, employers are only allowed to conclude three consecutive fixed term contracts with an employee and the appointment may not exceed two years in total.¹⁸⁷³ In Estonia, the maximum duration of a fixed term contract is five years. Only one renewal is allowed before the contract will be deemed as one for an indefinite duration.¹⁸⁷⁴ A two month gap in between fixed term contracts would not negate continuity of service for purposes of this provision. An amendment to the legislation during 2012 determines that if duties are performed by means of agency work, the restriction on consecutive contracts or extensions are applicable to each client separately.¹⁸⁷⁵

In Spain, employers are restricted to concluding two successive fixed term contracts. But, this maximum can be exceeded depending on the reason for which the contract

¹⁸⁶⁷ Article 334 of Code of Obligations of 1911 as last amended in March 2009.

¹⁸⁶⁸ Article 10 of the Employment Contract Act of 1978 (*Loi relative aux contrats de travail*).

¹⁸⁶⁹ Section 39(2) of the Labour Code Act 262 of 2006 sets a maximum cumulative duration of 24 months. However, exceptions are provided for in s 39(3) of the Labour Code Act. If a fixed term contract is used for purposes of temporary replacement, or in instances when there are serious operational reasons related to the nature of work the 2 year rule will not apply provided that the reasons are specified in a written agreement between the employer and the trade union organization.

¹⁸⁷⁰ Article 14 the Labour Contract Act 128 of 2007.

¹⁸⁷¹ Article L 1243-13 of the Labour Code (*Code du travail*).

¹⁸⁷² Article L 1242 - 8 L Labour Code (*Code du travail*).

¹⁸⁷³ Article 5 of the Presidential Decree 81 of 2003.

¹⁸⁷⁴ Article 10 of the Employment Contracts Act of 2009 (RT I 2009)2008.

¹⁸⁷⁵ Article 10.2 of the Employment Contracts Act of 2009.

was concluded. If the reason for the fixed term appointment is a temporary increase in the workload, the contract may only be renewed once within the maximum duration of eighteen months. No limitations apply if the reason for the conclusion of the fixed term contract is for the completion of a specific project or to stand in for someone else.¹⁸⁷⁶ The maximum duration of fixed term contract concluded for the performance of a specific job or service is three years. However, this maximum can be extended to four years by sectoral collective agreement or sector-wide collective agreement. After the three or four year period the employee becomes indefinitely appointed.¹⁸⁷⁷ A fixed term employee who, within a 30 month period, has been employed in the same position in the same undertaking under at least two contracts for a period of two years or longer, either directly or through a temporary employment agency will automatically become a permanent employee. This provision also applies to workers that may not be employed in the same positions and also those working in undertakings belonging to the same group.¹⁸⁷⁸

The maximum is five years in Hungary.¹⁸⁷⁹ In Luxembourg, a fixed term contract can generally not be concluded for longer than two years. In exceptional circumstances the limit can be moved up to five years.¹⁸⁸⁰ In the Netherlands a maximum of three successive contracts are allowed with intervals of less than three months between appointments.¹⁸⁸¹ The maximum cumulative length of a fixed term appointment is limited to three years.¹⁸⁸² In Slovenia, a fixed term contract to do the same work under the same conditions continuously, may not exceed two years in cumulative length.¹⁸⁸³ An interruption of three months between successive fixed term appointments will not influence continuity of employment.¹⁸⁸⁴ There are exceptions to the two year-limitation. Contracts concluded with managerial employees and for temporary replacements may, for instance, be extended beyond two years. Furthermore, extensions are allowed if the

¹⁸⁷⁶ Article 15(1)(b) of the *Estatuto de los trabajadores*.

¹⁸⁷⁷ Labour Reform Act 35 of 2010.

¹⁸⁷⁸ Article 15(5) of the *Estatuto de los trabajadores*.

¹⁸⁷⁹ Section 79(5) of the Labour Code Act No. XXII of 1992. However, this restriction does not apply to executives employees. See s 190(1) of the Labour Code Act.

¹⁸⁸⁰ Articles L 122 - 4(1), L 122 - 5 and L 122 - 2(4) of the Labour Code of 2006 determine that a fixed term contract may be renewed twice within 24 months. However, this limitation is not applicable to fixed term contracts concluded with university lecturers, researchers, artists or athletes and coaches.

¹⁸⁸¹ Section 7:668a (2) of the Civil Code Book 7 title 10 1822CC.

¹⁸⁸² Section 7:668a (1) of the Civil Code Book 7 title 10 1822CC.

¹⁸⁸³ Article 53(2) of the Employment Relationship Act 42 of 2002.

¹⁸⁸⁴ Article 53(4) of the Employment Relationship Act 42 of 2002.

project which a fixed term employee is appointed to complete has the effect of introducing innovative technologies or processes.¹⁸⁸⁵

In Sweden, if a fixed term employee is appointed in terms of a five year fixed term contract or appointed as a replacement for longer than two years the contract is automatically converted into an indefinite contract after two years.¹⁸⁸⁶

In Germany, the number of consecutive fixed term contracts is limited to four. There are exceptions to this rule. Since, if it is possible to provide objective reasons for using a fixed term contract, there seems to be no limitation regarding the number of renewals permitted. The maximum duration of successive fixed term contracts is restricted to two years, unless there is an objective reason for an appointment on a fixed term contract for a longer period in which case there is no limitation on the total period of a fixed term appointment.¹⁸⁸⁷

In Korea, objective and material reasons would exist in circumstances where the appointment from the onset is made for: a particular period which is necessary for the completion of a particular project or task; the purpose of the fixed term contract is to stand in for someone while he or she is suspended; the period in which an employee is required to complete school work or training is defined; the specific job which the fixed term employee is appointed to do requires professional knowledge or skills or is offered as part as the government's welfare or unemployment measures as are prescribed by a Presidential Decree or accords with the rational reasons as defined in a Decree.¹⁸⁸⁸

South Africa currently has no restriction on the number of renewals, maximum cumulative period of appointment or a legislative stipulation pertaining to the automatic conversion of a fixed term contract into an indefinite term contract. Despite the absence of a general provision, the stipulation to the effect that all fixed term employees are to be treated the same as permanent employees after six months of employment, except if disparity in treatment can be objectively justified,¹⁸⁸⁹ has the same practical effect as an automatic conversion clause.

¹⁸⁸⁵ Article 53(3) of the Employment Relationship Act 42 of 2002.

¹⁸⁸⁶ Section 5 of the Employment Protection Act of 1982.

¹⁸⁸⁷ Section 14(2) of the Part-Time and Fixed Term Employment Act of 2000.

¹⁸⁸⁸ Article 4(1) of the Act on the Protection of Fixed term and Part time Employees 8074 of 2006.

¹⁸⁸⁹ Section 198B(8) of the Labour Relations Amendment Bill of 2012.

Setting a shorter appointment period in comparative terms may not be such a positive move in as far as the provision of job security is concerned, considering the scarceness of employment opportunities in South Africa.¹⁸⁹⁰

6.6.6 Equal treatment of fixed term employees in other jurisdictions

There is no legislation in South Africa specifically related to equal treatment of fixed term employees in relation to indefinitely employed persons. This means that fixed term employees may be employed on less favourable conditions and at a lower rate of pay than indefinitely appointed employees who perform the same work or work of an equal value.

South Africa currently has statutory equality legislation which is similar to that in Germany. In Germany the General Equal Treatment Act¹⁸⁹¹ prohibits discrimination on a number of listed grounds, namely race, ethnic origin, gender, sexual identity, religion, disability and age.¹⁸⁹² Employers are prohibited from dismissing pregnant employees, those who are on maternity leave and within four months of their return after childbirth.¹⁸⁹³ A claim based on dismissal would have to be linked to one of these grounds or a ground considered being analogous thereto before an employment tribunal would consider an employer's conduct to be discriminatory. In Australia, the Fair Work Act also includes general protections against discriminatory or wrongful treatment.¹⁸⁹⁴ South Africa's equality legislation, like in these countries, does not expressly include a reference to equal payment for equal work.

Despite its importance in employment, the principle of equal pay has also not been effectively transposed into South Africa's labour legislation. A fixed term employee would be required to connect an unequal pay claim to one of the listed grounds in terms of s 6 of the EEA to have any type of remedy.¹⁸⁹⁵ Since there is no specific provision

¹⁸⁹⁰ See the discussion under 3 in Setting the scene.

¹⁸⁹¹ General Equal Treatment Act of 2006.

¹⁸⁹² Sections 1 & 2 of the General Equal Treatment Act of 2006.

¹⁸⁹³ Section 9 of the Maternity Protection Act of 2004.

¹⁸⁹⁴ Section 340 read with ss 341, 346 & 352 of the Fair Work Act 28 of 2009.

¹⁸⁹⁵ McGregor Marié 'Equal Remuneration for the Same Work or Work of Equal Value' (2011) *SA Merc Law J* Vol. 23 No. 3488 at 493 - 497. See also *Mangena & others v Fila South Africa (Pty) Ltd & others* [2009] 12 BLLR 1224 (LC) (2010) 31 ILJ 662 (LC) at para 5, *Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) at paras 15 & 17, *Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA* [2007] 1 BLLR 55 (LC) at paras 32 - 34 and *Mutale v Lorcom Twenty Two CC* [2009] 3 BLLR 217 (LC) at paras 38 & 40.

included in the EEA relating to equal pay there are also no objective criteria laid down that specifically apply to instances of discrimination by an employer with regards to the terms and conditions of employment for employees doing the same work, similar work or work of equal value. This means that the onus of proof rests on an employee to show that a differentiation exists that can be connected to one of the grounds listed in s 6 of the EEA or that the discrimination is unfair to the extent that it infringes on his or her dignity.¹⁸⁹⁶ In addition, how the court will ascertain whether or not this onus is discharged is left in the lurch.

Most European Member States have adopted the principle of equal treatment of fixed term employees in as far as the terms of conditions and the application of legislative employment protection is concerned.¹⁸⁹⁷ This principle has also been accepted in other countries.¹⁸⁹⁸

Concluding Remarks

Protection against unfair dismissal is essential. Insecure contractual arrangements and the phenomenon of the permanent temporary worker are becoming increasingly common. Fixed term employees are being forced to work harder, under worsening and often hazardous conditions whilst taking home declining wages and benefits. Due to the fact that fixed term employees are not provided with the means to develop and the same benefits as permanently appointed employees, a poverty trap is being created.¹⁸⁹⁹

Separate employment security measures have been established in many other countries. One of the aims of these measures is to ensure that fixed term contracts are utilised for legitimate purposes. In addition, they are aimed at protecting fixed term

¹⁸⁹⁶ It would constitute direct discrimination in terms of the EEA if an employer keeps a designated employee on doing the same work or work of equal value and remunerates him or her less than a non-designated employee based solely on the fact that he or she is a designated employee. Systemic or indirect discrimination is also possible in instances where workplace policies and/or practices have resulted in pay differentials that affect particularly black people, women and disabled persons. See item 12.2.1 of the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures.

¹⁸⁹⁷ See for instance Article L212-4-2 of the French Code du Travail.

¹⁸⁹⁸ See for instance art 6 of South Korea's Labor Standard Act 5309 of 1997.

¹⁸⁹⁹ See the discussion under 6.5.7.

employees against potential abuse. Another aim is to minimise the negative effects of informalisation and casualisation.¹⁹⁰⁰

South Africa has also recognised the need to protect fixed term employees. The process of amendment of the principle legislation in order to provide additional protection to these vulnerable workers started in 2009.¹⁹⁰¹ One of the aims of the proposed amendments is for South Africa to comply with its international law obligations.¹⁹⁰²

South Africa has not adopted the ILO Convention No. 158 of 1982 regarding Termination of Employment. Nevertheless, South Africa's dismissal legislation complies with its requirements.¹⁹⁰³

An amendment is proposed in order to promote access to union membership. Fixed term employees will also be considered when it is being established whether or not a trade union is 'sufficiently representative' in future.¹⁹⁰⁴

Section 186(1)(b) of the LRA will in future also provide protection to those fixed term employees who are capable of proving that they reasonably expected to be kept on indefinitely.¹⁹⁰⁵ The decision in *University of Pretoria v CCMA and others* will effectively be overruled when this provision comes into operation.¹⁹⁰⁶

Employing fixed term employees under temporary employment services will be restricted with regards to the reasons for such an appointment as well as the term of the engagement. In order to address the problems that fixed term employees working for labour brokers currently face in enforcing rights, joint and several liability is provided for.¹⁹⁰⁷

¹⁹⁰⁰ See the discussion under 2 in Setting the scene.

¹⁹⁰¹ See the discussion under 6.2.

¹⁹⁰² This is considered in 6.1.

¹⁹⁰³ This is discussed under 6.1.

¹⁹⁰⁴ Section 21(v) is introduced. Fixed term employees will be taken into account when establishing the size of the workforce. See the discussion under 6.2.1 above.

¹⁹⁰⁵ Section 186(1)(b) of the LRA will be amended so as to also include fixed term employees who claim based on a reasonable expectation of indefinite retention. This is discussed in 6.2.2.

¹⁹⁰⁶ See the discussion under 5.3 in Ch 5.

¹⁹⁰⁷ Section 200B of the Labour Relations Amendment Bill of 2012. See the discussion in 6.2.4 above.

After working for an employer for six months, a fixed term employee will be entitled to equal treatment. His or her employment conditions must be on the whole no less favourable than those of a comparable permanent employee's unless the employer is able to objectively justify the differential treatment.¹⁹⁰⁸ This means that fixed term employees must be provided with equal access to apply for vacancies¹⁹⁰⁹ and also receive the same payment and benefits as indefinitely appointed employees. There is no procedure prescribed for proving that the work, which a fixed term employee performs, is comparable to work performed by a permanent employee in the Labour Relations Amendment Bill of 2012.¹⁹¹⁰

New provisions are laid down in the Labour Relations Amendment Bill of 2012 in order to prevent undue delays in the resolution of labour disputes.¹⁹¹¹ Time limits are introduced for the referral of review applications and for handing down of judgments.¹⁹¹² An amount will have to be paid in as security when a matter is referred for review and review applications will for the most part only be allowed in instances where it will bring a matter to finality.¹⁹¹³

Dismissal protection will be made subject to qualification. In certain provisions qualification periods are set down and most of them are subject to the fixed term employees receiving a salary of less than the prescribed threshold amount.¹⁹¹⁴ In international law terms this is permissible.¹⁹¹⁵ However, due to the fact that South Africa's Constitution guarantees the right to fair labour practices, the differentiations that are being meted out will probably be in breach of the country's constitutional obligations.¹⁹¹⁶

The already over-burdened CCMA and bargaining councils will be responsible for the enforcement of the new procedures provided for in the Labour Relations Amendment

¹⁹⁰⁸ Section 198B(8) of the Labour Relations Amendment Bill of 2012. This is discussed under 6.2.3.

¹⁹⁰⁹ Section 198B(9) of the Labour Relations Amendment Bill of 2012. See the discussion in 6.2.3 above.

¹⁹¹⁰ This aspect is considered in 6.3 above.

¹⁹¹¹ This is discussed under 6.2.7.

¹⁹¹² See the discussion under 6.2.7.1.

¹⁹¹³ This is discussed in 6.2.7.2 and 6.2.7.2.

¹⁹¹⁴ See the discussion in 6.4 above.

¹⁹¹⁵ See the discussion in 6.1.4.

¹⁹¹⁶ See the discussion in Ch 1 under 1.2.

Bill of 2012.¹⁹¹⁷ Whether they have the capacity to handle the influx of work and effectively enforce the extended rights is questionable.

¹⁹¹⁷ See the discussion in 6.6.

Conclusion



Chapter 1 provides an overview of the rights that fixed term employees are entitled to against the backdrop of the Constitution. It is shown how even though fixed term employees are in principle granted the same rights as indefinitely appointed employees, they are still prejudiced by disparate protection provided in terms of the labour and social security legislation.

The same groups of persons are excluded from the application of the various pieces of labour and social security legislation.¹⁹¹⁸ Generally, the existence of an employment relationship is required in order for someone to enjoy the statutory protection against unfair dismissal. In the case of fixed term employees, a valid fixed term contract must also exist. Even though the same test is used to establish whether or not someone qualifies as an 'employee' for both indefinitely appointed persons and temporarily appointed employees, it may be easier to disguise a fixed term contract as some other type of contract.¹⁹¹⁹

The right to fair labour practices is a constitutional right which applies to all workers in South Africa.¹⁹²⁰ The scope of application is wider than the LRA's. The fundamental right to fair labour practices is not dependent upon the existence of a valid employment contract. The right to fair labour practices does not only protect employees. Employers enjoy business prerogative as part of their right to fair labour practices. The courts are reluctant to interfere with employers' decisions unless they are capricious, unreasonable or against public policy. The protection of job security is not an absolute right. Although it is acknowledged that the right not to be unfairly dismissed (and hence the right to job security) is firmly entrenched in the constitutional right to fair labour practices, the fundamental right requires balancing of the interests of employers and employees.¹⁹²¹

¹⁹¹⁸ See the discussion under 1.1.

¹⁹¹⁹ This is discussed under 1.1.

¹⁹²⁰ See the discussion under 1.2.

A distinction is made between indefinitely appointed employees and fixed term employees in the statutory dismissal protection that they are provided with. Consequently, a differentiation is impugned between fixed term employees and other employees, despite the fact that the definition of employee makes no such differentiation and does not distinguish between different classes of employees. The ordinary dismissal definition requires that the cause of the termination of employment must be an act or omission of the employer. Although it is conceivable that a fixed term employee could use the same remedy, they are required to rely upon a separate provision.¹⁹²²

The concept 'unfair labour practice' in the LRA has a more limited scope of application than the constitutional right. Only specific instances of conduct are identified as conduct which could potentially qualify as unfair labour practices. The intrinsic limitations in the unfair labour practice provision in the LRA may exclude its availability if the circumstances do not fall within the confines of the definition. Whereas, under the previous unfair dismissal provision, it may have been possible for fixed term employees to successfully claim based on unfair labour practice instead of unfair dismissal, the restrictive definition of this concept now minimalizes the possibility.¹⁹²³

The Constitution guarantees the right to freely associate to all workers. There is no intrinsic limitation to this right. The LRA is also specifically aimed at the promotion of collective bargaining. Although fixed term employees in principle enjoy this right, they are often not recruited into trade unions due to the precarious or temporary nature of their work. Collective agreements often do not cover them.¹⁹²⁴

The BCEA provides wide coverage and in principle, does not exclude fixed term employees from the protection that it provides. Nevertheless, enforcement of the rights is often a problem for fixed term employees. Those who are paid an hourly wage forfeit payments if they do not work for legitimate reasons when indefinitely appointed employees would usually be paid. Generally, fixed term appointments terminate automatically and fixed term employees are not entitled to notice prior to termination of their employment or payment in lieu of notice like permanent employees. Even in

¹⁹²¹ This is discussed under 1.2.2.

¹⁹²² See the discussion under 1.2.2.

¹⁹²³ See the discussion under 1.2.1. See also the discussion in Ch 3 under 3.1.1, 3.1.2 and 3.1.3.

¹⁹²⁴ This was discussed in 1.2.3.

instances where fixed term employees are dismissed for operational reasons, they are often not afforded additional severance pay.¹⁹²⁵

All of the rights contained in the Bill of Rights may be limited. This is only possible in instances where the court can justify the necessity of restricting the Constitutional Right in terms of s 36 of the Constitution.¹⁹²⁶

Fixed term employees, like permanent employees, have the right to work in a safe and healthy workplace. Segmentation of the workplace has resulted in inefficiency of health and safety training that is provided to workers. Fixed term employees are particularly vulnerable. They are viewed as contingent workers and are at a higher risk of not being afforded the required training. Hence, they are more exposed to risks to their health and safety.¹⁹²⁷ Fixed term employees must also be registered and employers are required to contribute for fixed term employees' unemployment insurance like for other employees. However, the benefits which fixed term employees can claim during spells of unemployment are limited. In addition, a fixed term employee who reasonable expects to continue working for an employer would usually not claim UIF, as a consequence of the expectation of continuation of his or her employment.¹⁹²⁸

South Africa's under-developed social insurance provisions fail to adequately provide for atypical employees. There is no mandatory retirement and health provision scheme in the country. Social security mechanisms do not have universal coverage either. This has a particularly negative effect on fixed term employees who are not covered by collective bargaining mechanisms and do not have access to pension and medical aid benefits.¹⁹²⁹

To ensure social justice, it is crucial to recognise a right to recourse and labour resolution mechanisms must be effective. In instances where the LRA or other legislation does not provide protection, the constitutional right to fair labour practices can be enforced. So far, no case dealing with an employer's failure to renew a fixed

¹⁹²⁵ See the discussion under 1.5.2.1.

¹⁹²⁶ This is discussed under 1.8.

¹⁹²⁷ This is discussed under 1.2.6.1.

¹⁹²⁸ See the discussion under 1.2.6.2. See also the discussion in Ch 3 under 3.2.3.10.

¹⁹²⁹ This is discussed under 1.2.6.

term contract has been referred in terms of s 23(1) of the Constitution. Limitations to the right to social justice must be capable of withstanding constitutional challenge.¹⁹³⁰

The constitutional protection against unfair discrimination is aimed at addressing systemic disadvantage as a result of past unequal treatment. The aim is the achievement of substantive equality. The fundamental right to equality before the law is of general application. It enumerates specific grounds which would potentially qualify as being unfair. These grounds do not include any reference regarding equal treatment or equal pay. The constitutional provision also does not prohibit discrimination based on employment status.

Despite the fact that fixed term contracts are used in situations where permanent employees are unavailable, temporary appointments are considered to be inferior to the standard form of employment. The perceived inferiority of fixed term contract in comparison with indefinite employment and the social impacts of these atypical appointments justify regulation to prohibit abuse. The line of divide created by legal faults between fixed term employees and permanent employees not only has the potential to infringe upon constitutional rights but also to leave vulnerable employees remediless.¹⁹³¹ It is possible to refer a dispute on a ground analogous to those listed if the discrimination has the result of infringing on the right to dignity. It is possible that fixed term employees can potentially claim that they are discriminated against based on their contractual status. This has not yet happened in South Africa.¹⁹³²

The LRA and the EEA specifically prohibit discrimination in the sphere of employment. Although the EEA adds certain grounds to those that are listed in s 9 of the Constitution, it also does not refer to contractual status or unfair pay as prohibited grounds.¹⁹³³

The affirmative action provisions contained in the EEA are aimed at promoting certain specified groups of designated employees. They are only intended to benefit South African citizens. These measures may have certain unintended negative effects: Systemic discrimination against non-designated employees may ensue. In addition, the perception may be created that designated employees are not appointed by virtue of

¹⁹³⁰ See the discussion under 1.8.

¹⁹³¹ See the discussion under 5.3.

¹⁹³² This is discussed in 1.3.1.

¹⁹³³ See the discussion in 1.3.3 above.

their merits. This may result in an exodus of (already scarce) skilled workers. The link between affirmative action and efficiency should be maintained.¹⁹³⁴

Highly skilled employees are scarce in South Africa's workforce. The Constitution provides for the right of access to basic education for all of the country's citizens. The Skills Development Act was enacted to enhance skills of workers. This piece of legislation applies equally to fixed term employees. Although the LRA declares the unfair provision of training an unfair labour practice, fixed term employees are often not provided with training. This is understandable if a fixed term employee is only appointed for a short period of time to fill in for someone or to perform a specific task of limited duration for which he or she has already received the required training. It is clear that to impose a general duty to provide training to all employees would be contrary to the operational rationale for the conclusion of a fixed term contract in certain circumstances. But, in instances where fixed term employees are kept in a temporary position where the nature of work which they are required to perform resembles or better suits a permanent appointment, withholding equal training would be unfair.¹⁹³⁵

The PEPUDA also prohibits unfair discrimination. It, like the Constitution, is of general application. The PEPUDA does contain a stipulation regarding equal pay and recognises an employer's failure to ensure that employees who perform work of equal value are paid equally as a potential unfair labour practice. But, the PEPUDA is not applicable where the EEA is capable of providing protection. This remedy would therefore serve very little, if any, purpose in the employment arena. The effect is that South Africa's equality legislation does not currently provide for a right to equal treatment that is directly justiciable, unless a claimant can prove that there is a link between the discrimination and one of the listed grounds in s 6 of the EEA.¹⁹³⁶

The Constitution provides that all individuals should have access to information which they require for the exercise of their rights. The PAIA, which was enacted to give effect to this fundamental right, sets out the procedure which should be followed by someone wishing to gain access to such information. The existence of these statutory procedures

¹⁹³⁴ See the discussion under 1.3.2 above.

¹⁹³⁵ This was discussed under 1.5 above.

¹⁹³⁶ This is discussed under 1.3.

makes it unnecessary for other legislation to specify procedures for gaining access to rights.¹⁹³⁷

In **Chapter 2** some important common law provisions pertaining to termination of fixed term contracts of employment is investigated. In principle, if a fixed term contract is terminated unlawfully and the situation does not fall within the confines of the labour legislation, the common law principles related to contract would still provide a remedy.¹⁹³⁸ The common law has been developed to also include requirements of fairness in the termination of a fixed term contract, including the right not to be dismissed unfairly.¹⁹³⁹

There are no requirements in terms of the labour legislation that a written contract of employment must be concluded.¹⁹⁴⁰ The BCEA only requires that written particulars must be provided to an employee.¹⁹⁴¹ Such particulars very often do not qualify as contracts that both parties are required to sign. Extrinsic evidence is often excluded in an enquiry based on breach of contract. Terms are not readily inferred into a contract. It is well accepted that, in the absence of a stipulation dealing with a notice period for termination,¹⁹⁴² an employer can rely on the termination date agreed upon in a fixed term contract, without giving notice as required under the BCEA.¹⁹⁴³

In terms of the common law fixed term contracts terminate automatically without legal consequence. Based on the principles of freedom to contract, parties may conclude contracts on any terms and be bound to them. This common law rule is fettered by the Constitution and public policy.¹⁹⁴⁴

¹⁹³⁷ This is considered in 1.6 above.

¹⁹³⁸ See the discussion under 2.8 above.

¹⁹³⁹ See the discussion under 2.8 above.

¹⁹⁴⁰ *Southgate Blue IQ Investment Holding* (2012) 33 ILJ 2681 (LC) at paras 21 & 32. A fixed term contract of employment can be concluded expressly, impliedly or tacitly. In this case (at 41 - 42) it was held that in the particular circumstances of the case even if the parties had agreed that the contract would be put in writing, it is not a requirement for the validity of the contract.

¹⁹⁴¹ Section 29(1) of the BCEA.

¹⁹⁴² It is possible to include a notice period in a fixed term contract. Grogan calls such an agreement a 'maximum duration contract'. Grogan *Employment Rights* (2010) at 62 – 64. See also *Mafihla v Govan Mbeki Municipality* [2005] 4 BLLR 334 (LC) at para 37.

¹⁹⁴³ Gericke 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as opposed to Indefinite Employment' at 12.

¹⁹⁴⁴ See the discussion under 2.1.

The common law has developed to also include considerations of fairness. South African courts recognise the duty of mutual trust and confidence. A part of this duty is the duty to respect the legitimate expectations of fixed term employees.¹⁹⁴⁵ The courts have also recognised the fact that employment relationships, unlike commercial contracts, are evolving. Since obligations and expectations may change over time it becomes necessary to, in certain circumstances, imply terms in order to give effect to the intentions of the parties to an employment contract. So for instance, the continual rolling over of a fixed term contract could give rise to an implied term of continuance of a fixed term appointment.¹⁹⁴⁶ It is also accepted, even in the absence of an express agreement, that fixed term contracts may be tacitly renewed through conduct.¹⁹⁴⁷

The doctrine of legitimate expectation is part of the South African law. It extends the scope of protection that fixed term employees enjoy to instances beyond rights that are legally enforceable.¹⁹⁴⁸ However, South African courts are reluctant to accept that legitimate expectation goes further than merely the entitlement to a fair procedure. This negatively affects the availability of remedies in terms of s 186(1)(b) of the LRA.

In certain circumstances, the doctrine of estoppel can be used by a fixed term employee in order to prevent an employer from avoiding the legal consequences associated with a misrepresentation which it had made.¹⁹⁴⁹

The court usually gives effect to an express term in a contract. Premature termination of a fixed term contract will be considered unlawful. But, in order to prove that a dismissal was unlawful based upon a reasonable expectation requires consideration of all the surrounding circumstances.

In terms of the common law, a contract may be lawfully terminated, but failure to ensure that a proper procedure is followed in terminating the contract may render the termination unfair. If, for instance, a fixed term employee in the currency of his or her employment is found guilty of serious misconduct, it would probably constitute a material breach justifying a lawful termination.

¹⁹⁴⁵ See the discussion under 2.2 above.

¹⁹⁴⁶ See the discussion under 2.3 above.

¹⁹⁴⁷ This is discussed in 2.4 above.

¹⁹⁴⁸ See the discussion under 2.5.

¹⁹⁴⁹ See the discussion under 2.6.

If the employer did not follow the proper procedures, such a fixed term employee would still be in a position to, possibly succeed in a claim based on unfair dismissal if such a claim was not made dependent upon the existence of a reasonable expectation. Serious misconduct would probably negate a claim that such an expectation could have been created. It could, in other words, be argued that the examination into the fairness of the reason for not renewing the fixed term contract could be seen as part of the test to establish the reasonableness of the expectation that the employee had, that his or her employment would continue.

It would seem as if in dismissal cases in terms of s 186(1)(b) of the LRA, substantive reasons for a dismissal are considered as part and parcel of the test to establish whether or not a reasonable expectation of renewal was created (without which no dismissal could exist) and not separately in the investigation to determine whether or not the dismissal was fair.

The fact that protection is provided for in terms of legislation, does not detract from the common law rights that fixed term employees enjoy. The statutory rights are intended to supplement the common law rights.

Failure to renew a fixed term contract when there was an agreement that it would be renewed, would constitute a material breach of contract entitling the fixed term employee to contractual remedies. But, proving it may be very difficult. Employers are not required to conclude fixed term contracts of employment in writing. The fixed term employee would be required to prove the existence of all the contractual terms that he or she is relying upon and the absence of the defence which the employer relies upon. In addition, he or she is required to prove that actual damages had been suffered by him or her as a result of the breach and the amount of such damages.

If the legislation fails to give effect to a constitutional right, the courts are required to develop the common law to the extent required to give effect to the fundamental right.

In **Chapter 3** the substance and practicality of the statutory right of fixed term employees not to be unfairly dismissed, is analysed by considering the scope of application, the burden of proof and the availability of the remedies as contained in the LRA. It is indicated that the LRA's dismissal and unfair labour practice provisions contain more stumble blocks for fixed term employees than for permanent employees. Despite theoretical protection against unfair dismissal, the anomalies in the legislative

protection and the protracted nature of the legal process means that fixed term employees currently have little effective security of employment.

Fixed term employees may be disinclined to institute legal proceedings against their employers in the course of employment. Strict time limits are set for the institution of labour disputes.¹⁹⁵⁰ The unfair labour practice definition does not cover all instances of unfair conduct.¹⁹⁵¹

To decide who should be promoted is considered as part of the business prerogative that employers enjoy. 'Renewal' of a fixed term contract in terms of s 186(1)(b) of the LRA would not constitute an elevation to a higher position.¹⁹⁵² A fixed term employee, who works in a higher position temporarily and is then returned to his or her previous position, will also not succeed in a claim based on unfair demotion.¹⁹⁵³ In limited circumstances, it may be possible to combine a claim based on unfair labour practices with an unfair promotion claim. The provision of benefits to employees is discretionary. It is not a legislated right. What qualifies as 'benefits' has not been made very clear. Since fixed term employees often rely upon a reasonable expectation, it may be very difficult for them to prove a legal entitlement to benefits.¹⁹⁵⁴

There are a number of problems with the protection provided under s 186(1)(b) of the LRA.¹⁹⁵⁵ South African fixed term employees do not have immediate access to protection against unfair dismissal.¹⁹⁵⁶ The onus of proof to prove that a dismissal had occurred usually rests on the fixed term employee.¹⁹⁵⁷ If a fixed term contract determines that the employment relationship will terminate upon the happening of a specific event or completion of a particular project, the employer is required to prove that this event had occurred or the project has been completed. The courts are reluctant to interfere with the decisions of employers in these instances. Before a dismissal is established, a fixed term employee is required to prove that he or she reasonably expected to continue working for the employer.¹⁹⁵⁸

¹⁹⁵⁰ See the discussion under 3.1 above.

¹⁹⁵¹ This is discussed under 3.1.1 – 3.1.3.

¹⁹⁵² See the discussion under 3.1.1 above.

¹⁹⁵³ This is discussed under 3.1.3.

¹⁹⁵⁴ See the discussion under 3.1.2 above.

¹⁹⁵⁵ These problems are discussed under 3.2.

¹⁹⁵⁶ Section 186(1)(b) of the LRA which is made applicable to fixed term employees set certain qualifications.

¹⁹⁵⁷ This is as a result of the application of s 191 of the LRA. See the discussion under 3.2.1.

¹⁹⁵⁸ See the discussion under 3.2.1.

The existence of a substantive expectation of renewal of a fixed term contract is insufficient. It must be proven that such an expectation was reasonable.¹⁹⁵⁹ The courts have laid down factors that are required in order to establish whether or not an expectation of continuance of employment is reasonable in the circumstances. Nevertheless, this assessment requires consideration of all the surrounding circumstances.¹⁹⁶⁰

Even if a fixed term employee is capable of proving that he or she had a reasonable expectation that his or her employment would continue, it does not mean that an unfair dismissal occurred.¹⁹⁶¹ It is possible for an employer to raise a plethora of reasons justifying termination of employment. Such reasons may not necessarily even have existed at the time of dismissal. Employers, who successfully raise a defence, may escape liability for unfair dismissal if the presiding officer considers it to be reasonable.¹⁹⁶²

The Code of Good Practice: Dismissal does not specifically deal with termination of fixed term employment contracts. No guidelines are provided regarding the procedure that employers should follow prior to dismissal.¹⁹⁶³

There is no legislative provision requiring employers to provide reasons for the initial appointment of workers on fixed term contracts or for subsequent renewal of fixed term employment contracts. Nevertheless, the case law makes it clear that employers are not permitted to abuse fixed term contract in order to avoid their legal obligations.¹⁹⁶⁴

The wording of a fixed term contract of employment is an important indication of the intention of the parties. Under certain circumstances, the express terms of a fixed term contract may exclude the possibility of an unfair dismissal claim. However, clauses excluding the possibility of the development of a reasonable expectation in the employment relationship are viewed as being contrary to public policy and are generally not enforced.¹⁹⁶⁵

¹⁹⁵⁹ This is discussed under 3.2.1 – 3.2.3.

¹⁹⁶⁰ See the discussion under 3.2.3.

¹⁹⁶¹ Upon the plain wording of s 186(1)(b) of the LRA it would only constitute a dismissal and not an unfair dismissal.

¹⁹⁶² See the discussion under 3.4.

¹⁹⁶³ See the discussion under 3.4.2.

¹⁹⁶⁴ See the discussion under 3.2.3.4.

¹⁹⁶⁵ This is discussed under 3.2.3.3.

It is unclear from the case law whether or not employers are allowed to lawfully terminate fixed term contracts for operational reasons prior to the agreed upon termination date.¹⁹⁶⁶ A breakdown of the employment relationship and serious misconduct by the fixed term employee excludes a reasonable expectation of continuance of employment.¹⁹⁶⁷ The substantive fairness (reason for the dismissal) is often considered as part of the test to establish whether or not an expectation of continuance of employment is reasonable. No separate enquiry is necessary.¹⁹⁶⁸

Employers are not required to provide fixed term employees with reasons for termination of their employment. In terms of the common law, fixed term employees terminate automatically. Consequently, no fair reason has to exist for the termination of these contracts and no special procedure needs to be followed by employers.¹⁹⁶⁹

Section 194 of the LRA limits the amount of compensation that is claimable for unfair dismissal. This restriction does not take account of the fact that fixed term employees are denied benefits that indefinitely appointed employees receive in the course of employment, including medical aid benefits and pension benefits. In general, compensation awards are also much lower than the statutory maximum. These awards often do not compensate fixed term employees adequately.¹⁹⁷⁰

Very often, fixed term employees will be unable to claim re-instatement as remedy. It is uncertain whether the term of re-appointment can exceed the original term for which the fixed term contract had been concluded. Usually, the working relationship would have deteriorated or the employer would have appointed someone else. This detracts from the legitimacy of the LRA as means of ensuring access to social justice. Some courts feel that fixed term employees should only receive remuneration in the amount that they would receive in terms of the common law. Consequently, presiding officers may restrict compensation awards to only one month's remuneration (being the amount that the fixed term employee would have received if proper notice had been given) or, at most, a pay-out for the remaining term of the appointment. But, fixed term employees cannot be sure of anything when referring an unfair dismissal dispute. There is no guaranteed

¹⁹⁶⁶ See the discussion in 3.2.3.6.
¹⁹⁶⁷ This is discussed in 3.2.3.7.
¹⁹⁶⁸ This is discussed under 3.4.2.
¹⁹⁶⁹ See the discussions under 3.4.2.1 – 3.4.2.3.
¹⁹⁷⁰ See the discussion under 3.5.2.

basic compensation award that they will definitely receive. What remedy is provided to them, if any, is left completely within the presiding officer's discretion. The LRA makes no effort to preserve employment and socio-economic circumstances are ignored during the determination of what remedy is appropriate.

In **Chapter 4**, the jurisdictional uncertainties and problems emanating from over-technicality and tedious dispute resolution processes is examined with reference to case law in point to discover the existence of underlying lacunae in the legislative protection provided to fixed term employees in terms of the LRA.

The dispute resolution process is overly technical. It is possible for a party to raise a point *in limine* at any time during the proceedings.¹⁹⁷¹ There are also many jurisdictional issues: the fixed term employee could be required to prove that he or she qualifies as an 'employee', the referral must also have been done in time.¹⁹⁷² For s 186(1)(b) of the LRA to apply, it must also be established that a valid fixed term contract had been concluded.¹⁹⁷³ A matter that is referred to the CCMA for resolution may follow an extended route to the Labour Court, Labour Appeal Court, Supreme Court of Appeal and even the Constitutional Court. This can, of course, lead to major delays in the finalisation of labour disputes.¹⁹⁷⁴ Whereas reviews were only supposed to be undertaken in exceptional circumstances, it has become the norm. Matters are referred on review on interlocutory points without bringing them any closer to finality. It may even happen that these reviews of points *in limine* could result in matters being disposed of, without the merits ever having been heard.¹⁹⁷⁵

Despite the availability of various remedies, the dispute resolution process may be prohibitively expensive for some fixed term employees. They may be required to refer a dispute to more than one forum in order to attain a meaningful remedy.¹⁹⁷⁶ Although

¹⁹⁷¹ See the discussion under 4.1 and 4.3.2 above.

¹⁹⁷² See the discussion in 4.1.1 above.

¹⁹⁷³ This is discussed in 4.1.2.

¹⁹⁷⁴ See the discussion under 2 above.

¹⁹⁷⁵ This for instance happened in *Geldenhuis and University of Pretoria* (2008) 29 ILJ 1772 (CCMA). A point *in limine* regarding the CCMA's jurisdiction to entertain a dispute in terms of s 186(1)(b) of the LRA, when the fixed term employee had a reasonable expectation of permanent appointment, resulted in review proceedings. The employer who was unsuccessful in the Labour Court then took the matter on appeal, which succeeded. The effect was that the merits of this matter were never heard. See also the discussion in Ch 5 under 5.3.

¹⁹⁷⁶ See the discussion under 4.4 above.

South Africa's dispute resolution system is aimed at expedience, labour matters often take extremely long to resolve.¹⁹⁷⁷

Cost orders in the Labour Court do not always follow suit. The risk of a possible cost order may prevent referral of disputes. The costs associated with labour dispute resolution often outweigh the remedies provided for in the LRA.¹⁹⁷⁸

In **Chapter 5**, the role of the Constitution in the interpretation of labour legislation, and the duty of the courts to develop the common law in accordance with the entrenched values is set out and evaluated. When measured against the prescripts that have been laid down in the Constitutional Court for interpretation of the LRA, it is apparent that the current interpretation of s 186(1)(b) is not aligned with the constitutional values.

Despite the clear guidelines set by the Constitutional Court on how the LRA should be interpreted, the Labour Appeal Court failed to follow these prescripts.¹⁹⁷⁹ The effect of following a restrictive literal approach, instead of a purposive one, is that fixed term employees who expect more than what they previously had in terms of their fixed term appointment, would be left remediless in terms of the unfair dismissal provision in the LRA, even if the circumstances were such that the belief was reasonable.¹⁹⁸⁰ Because South Africa follows a system of legal precedent, this case will continue to have a negative impact in disputes where fixed term employees claim based on a reasonable expectation of permanent appointment.¹⁹⁸¹

Holistically viewed, the wording of the provision creates multiple pitfalls for fixed term employees that other employees are not exposed to. Problems in the practical enforcement result from the qualifications set to attainment of the right to not be unfairly dismissed in both the wording and in the construct afforded to the dismissal provision by the courts. It may not be defensible considering the potential impact on fixed term employees' constitutional rights. It is unthinkable that the Legislature intended that employers could be allowed to act contrary to their legislative obligations. This

¹⁹⁷⁷ This is discussed under 4.3.3 above.

¹⁹⁷⁸ See the discussion under 4.4 above.

¹⁹⁷⁹ See the discussion under 5.3 above.

¹⁹⁸⁰ See the discussion under 5.3.

¹⁹⁸¹ This is discussed in 5.4.

interpretation infringes a fixed term employee's explicit right to fair labour practices and amounts to unfair discrimination.¹⁹⁸²

Chapter 6 deals with some of the proposed amendments In the Labour Relations Amendment Bill that are of specific pertinence to the rights of fixed term employees. Having regard to South Africa's international obligations and the dismissal protection provided in various other countries, it is indicated that these changes do comply with international law obligations and international standards. However, the new introductions may have some unintended negative effects.

Protection against unfair dismissal is essential. Insecure contractual arrangements and the phenomenon of the permanent temporary worker are becoming increasingly common. Fixed term employees are being forced to work harder, under worsening and often hazardous conditions whilst taking home declining wages and benefits. Due to the fact that fixed term employees are not provided with the means to develop and the same benefits as permanently appointed employees, a poverty trap is being created.¹⁹⁸³

Separate employment security measures have been established in many other countries. One of the aims of these measures is to ensure that fixed term contracts are utilised for legitimate purposes. In addition, they are aimed at protecting fixed term employees against potential abuse. Another aim is to minimise the negative effects of informalisation and casualisation.¹⁹⁸⁴

South Africa has also recognised the need to protect fixed term employees. The process of amendment of the principle legislation in order to provide additional protection to these vulnerable workers started in 2009. A regulatory impact assessment was performed on proposed amendments to the LRA in 2010. The provisions in the 2012 amendments are not the same as those for which the regulatory impact assessment were done. Accordingly, a new assessment is required for the Labour Relations Amendment Bill of 2012 in order to ascertain what the potential impact of the proposed provisions will be.¹⁹⁸⁵

¹⁹⁸² See also the discussion under 5.3 in Ch 5.

¹⁹⁸³ See the discussion under 6.5.7.

¹⁹⁸⁴ See the discussion under 2 in Setting the scene.

¹⁹⁸⁵ See the discussion under 6.2.

One of the aims of the proposed amendments is for South Africa to comply with its international law obligations. The Constitution obliges the country to apply public international law and to consider foreign law.¹⁹⁸⁶ South Africa has not adopted the ILO Convention No. 158 of 1982 regarding Termination of Employment. Nevertheless, South Africa's dismissal legislation complies with its requirements.¹⁹⁸⁷

An amendment to the LRA is proposed in order to promote access to union membership. Fixed term employees will also be considered when it is being established whether or not a trade union is 'sufficiently representative' in future.¹⁹⁸⁸

Section 186(1)(b) of the LRA will in future also provide protection to those fixed term employees who are capable of proving that they reasonably expected to be kept on indefinitely.¹⁹⁸⁹ The decision in *University of Pretoria v CCMA and others* will effectively be overruled when this provision comes into operation.¹⁹⁹⁰

Employing fixed term employees under temporary employment services will be restricted in as far as the reasons for such an appointment as well as the term of the engagement. In order to address the problems that fixed term employees working for labour brokers currently face in enforcing rights, joint and several liability is provided for.¹⁹⁹¹

'Fixed term contract' is defined for the first time.¹⁹⁹² The statutory definition includes the possibility of termination of a fixed term contract on a specific date, upon the happening of an event or completion of a project. It is unclear whether or not the inclusion of a clause enabling either party to terminate the contract by notice would make the contract something other than a fixed term contract. It is proposed that guidelines should be provided in order to clarify the application of the definition.

After working for an employer for six months, a fixed term employee will be entitled to equal treatment. His or her employment conditions must be, on the whole, no less

¹⁹⁸⁶ This is considered in 6.1.

¹⁹⁸⁷ This is discussed under 6.1.

¹⁹⁸⁸ Section 21(v) is introduced. Fixed term employees will be taken into account when establishing the size of the workforce. See the discussion under 6.2.1 above.

¹⁹⁸⁹ Section 186(1)(b) of the LRA will be amended so as to also include fixed term employees who claim based on a reasonable expectation of indefinite retention. This is discussed in 6.2.2.

¹⁹⁹⁰ See the discussion under 5.3 in Ch 5.

¹⁹⁹¹ Section 200B of the Labour Relations Amendment Bill of 2012. See the discussion in 6.2.4 above.

favourable than those of a comparable permanent employee's unless the employer is able to objectively justify the differential treatment.¹⁹⁹³ This means that fixed term employees must be provided with equal access to apply for vacancies¹⁹⁹⁴ and also receive the same payment and benefits as indefinitely appointed employees. There is no procedure prescribed for proving that the work which a fixed term employee performs is comparable to work performed by a permanent employee in the Labour Relations Amendment Bill of 2012.¹⁹⁹⁵

The already over-burdened CCMA and bargaining councils will be responsible for the enforcement of the new procedures provided for in the Labour Relations Amendment Bill of 2012.¹⁹⁹⁶

New provisions are laid down in the Labour Relations Amendment Bill of 2012 in order to prevent undue delays in the resolution of labour disputes.¹⁹⁹⁷ Time limits are introduced for the referral of review applications and for handing down of judgments.¹⁹⁹⁸ An amount will have to be paid in as security when a matter is referred for review and review applications will, for the most part, only be allowed in instances where it will bring a matter to finality.¹⁹⁹⁹

It has always been difficult to prove the existence of an employment relationship.²⁰⁰⁰ The LRA Amendment Bill of 2012 addresses this jurisdictional aspect only to the extent that it extends the application of the statutory presumption in favour of an employment relationship.²⁰⁰¹

Dismissal protection will be made subject to qualification. In certain provisions qualification periods are set down and most of them are subject to the fixed term employees receiving a salary of less than the prescribed threshold amount.²⁰⁰² In international law terms this is permissible.²⁰⁰³ However, due to the fact that South

¹⁹⁹² Section 198B(1) of the Labour Relations Amendment Bill of 2012. This is considered in 6.2.2.3.
¹⁹⁹³ Section 198B(8) of the Labour Relations Amendment Bill of 2012. This is discussed under 6.2.3.
¹⁹⁹⁴ Section 198B(9) of the Labour Relations Amendment Bill of 2012. See the discussion in 6.2.3 above.
¹⁹⁹⁵ This aspect is considered in 6.3 above.
¹⁹⁹⁶ See the discussion in 6.6.
¹⁹⁹⁷ This is discussed under 6.2.7.
¹⁹⁹⁸ See the discussion under 6.2.7.1.
¹⁹⁹⁹ This is discussed in 6.2.7.2 and 6.2.7.2.
²⁰⁰⁰ See the discussions under 1.1 in Ch1 and 4.12 in Ch 4.
²⁰⁰¹ This is discussed in 6.2.8.
²⁰⁰² See the discussion in 6.4 above.
²⁰⁰³ See the discussion in 6.1.4.

Africa's Constitution guarantees the right to fair labour practices, the differentiations that are being meted out will probably be in breach of the country's constitutional obligations.²⁰⁰⁴

Obviously, the ideal would be to provide every eligible labour force participant with indefinite, decent work that offers benefits. However, this ideal is unrealistic and probably unattainable considering the high unemployment rate in South Africa and the lack of skills of the country's citizens.²⁰⁰⁵ This brief overview of some of the issues involved in the development of effective legislation indicates that it is an area of complexity, requiring a clear articulation of social policy. The current contest against the possible amendment of the legislation points to an on-going struggle to define, with clarity, what protection fixed term employees should enjoy.

South Africa's labour market is viewed as one of the most strictly regulated in the world. This is a result of the relatively strict measures for the protection of permanent employment. In as far as fixed term employment is concerned employees are currently, in comparative terms, under-regulated.²⁰⁰⁶ Although it seems that by providing equal rights to fixed term employees as proposed in the Labour Relations Amendment Bill of 2012, would be a major jump from the current position, in the international context South Africa's labour regulatory regime will not become extraordinarily over-regulated.²⁰⁰⁷

The proposed amendments will afford protection to fixed term employees who are currently excluded from the legislation against unfair dismissal.²⁰⁰⁸ In addition, fixed term employees will gain employment security and access to benefits.²⁰⁰⁹ The legislative purpose to prevent employers from indefinitely employing vulnerable fixed term workers on terms that are less favourable than those of indefinitely employed persons will become enforceable.²⁰¹⁰ Realising access to social justice and specialised dispute resolution institutions is imperative. Improved labour relations may lead to improved efficiency and equity in the labour market.

²⁰⁰⁴ See the discussion in Ch 1 under 1.2.

²⁰⁰⁵ See the discussion under 3 in Setting the scene.

²⁰⁰⁶ See the discussion under 6.5.8.

²⁰⁰⁷ See the discussion under 6.5.8.

²⁰⁰⁸ This is considered in 6.2.2 above.

²⁰⁰⁹ See the discussion in 6.6.2.

²⁰¹⁰ See 3.4.1 in Ch 3 and in 6.5.7.

The biggest problems relating to the current dismissal legislation pertaining to fixed term employment are located around the ambiguity in wording and the lack of clear procedures.²⁰¹¹ A proper interpretation of the provisions that are currently applicable to protect the right of fixed term employees against unfair dismissal could assist in addressing certain anomalies. However, the courts have made it clear that it is better to effect change by means of the enactment of legislation rather than to leave it to them to develop the common law. The country's unique socio-economic environment and the inadequacies in the current system necessitate statutory intervention.²⁰¹²

The reform is evidently an attempt by the Legislature to close the existing legal loopholes and to address the legislative weaknesses. But, the Labour Relations Amendment Bill of 2012 leaves much uncertainty. On the face of it, the proposed legislative changes seem to extend the unfair dismissal protection that fixed term employees have. However, the proposed statutory interventions contain many of the old pitfalls. The proposed amendment of s 186(1)(b) is oddly worded and maintains many of the jurisdictional concerns connected to the current provision.²⁰¹³ South African lawyers will not be able to avoid problems in proving the existence of a dismissal. Little guidance is provided in the proposed legislation as to how the new rights are to be proven and enforced. The uncertainties and internal restrictions contained in the proposed provisions could have the unintended effect of restricting rights even more.

7.1 RECOMMENDATIONS

A. Further research is required

Even though the lack of regulation and the negative effect in as far as informalisation of the South African labour market is concerned has been recognised, very little has been done to address the problem. Research in the area of atypical employment seems to have been lagging behind. This makes it extremely difficult to predict what the effect of regulation of fixed term employment would be. A proper assessment should be done into the possible detrimental effects on South Africa's economy.

²⁰¹¹ This is discussed in Ch 5.

²⁰¹² See the discussion under 5.5.

To properly and pro-actively assess the appropriateness of legislative intervention could prevent negative impacts. The policy document outlining the considerations that informed the proposed amendments to the LRA is set in rather vague terms. The RIA of 2010 was drafted for purposes of the Labour Relations Amendment Bill of 2010 and not for the updated 2012 version. In addition, it is based on a number of assumptions and suppositions which makes it very difficult to accurately ascertain what effect the enactment of the new legislation will have on South African fixed term employees. It also seems as if certain aspects are proposed in respect of the enjoyment of rights fundamental to the labour relationship without proper policy consideration. It is untenable to follow a wait and see-approach when skills development, social security and employment security are at stake.²⁰¹⁴

B. The role of affirmative action programmes in relation to the appointment of fixed term employees should be reconsidered

The EEA expressly provides that a ‘designated employee’ who shows the potential to develop the skills required in order to perform a specific job should be provided with such an opportunity and be preferred over someone who does not qualify as a designated employee. The courts have made it clear that this is not an unqualified premise. It is suggested that where the position is one for a fixed term which entails the replacement of another worker, this principle should not apply at all. Considering the commercial rationale for the conclusion of such a fixed term contract, it would make no sense if a fixed term employee would require further training before being capable to perform the task he or she is appointed to do.²⁰¹⁵

C. The ordinary dismissal provision (s 186(1)(a) of the LRA) should be applied to fixed term employees and s 186(1)(b) should be repealed

The definition of dismissal as contained in s 186(1)(a) of the LRA is sufficiently wide to cover the circumstances when a fixed term contract is terminated as a result of an employer’s failure to renew it. Therefore, there is no need for a separate provision for fixed term employees requiring proof of multiple jurisdictional aspects that indefinitely appointed employees do not have to prove.

²⁰¹³ See the discussion under 6.2.2.

²⁰¹⁴ Some of the possible negative effects are discussed in 6.5.

²⁰¹⁵ See 1.3.2 in Ch 1.

Although the proposed provision in the Labour Relations Amendment Bill of 2012 does address some of the flaws in the current provision, it is oddly worded and will most probably maintain many of the uncertainties associated with the current provision.²⁰¹⁶

D. The unfair dismissal protection should not be made subject to a threshold salary for eligibility or corroboration with the South African Revenue Service must be assured

It is suggested that this eligibility criterion is arbitrary and probably unconstitutional. In addition, the CCMA does not have the capacity or expertise to properly enforce this eligibility criterion. If this provision is to become effective, corroboration with the South African Revenue Service would be essential to ensure that applicants' income is accurately determined and to limit fraud and corruption in the performance of this means test.²⁰¹⁷

E. The Code of Good Practice: Dismissal must be adapted and updated

The idea behind promulgation of the Code of Good Practice: Dismissal was that it would be updated to show how the law is adapted and applied in the Labour Courts. The Code of Good Practice: Dismissal has never provided any details regarding the termination of fixed term contracts of employment. The world of work has changed. This has resulted in the need for additional protection for fixed term employees. Particularly in the light of the proposed amendments affecting fixed term employees, it is important to provide information in the Code of Good Practice: Dismissal on the procedures that employers are required to follow when terminating fixed term contracts of employment.²⁰¹⁸

F. The remedies for unfair dismissal need to be reconsidered

Currently the principle remedy in case of unfair dismissal is very rarely available. Preserving employment is not a prioritized. The courts also do not consider socio-economic factors when deciding on what remedy is appropriate in the circumstances. In a country with such a high unemployment rate, it is unacceptable. It is suggested that South Africa should consider importing principles such as considering age and social standing prior to deciding which remedy is appropriate. In addition, methods should be

²⁰¹⁶ See the discussions in 1.2.2 in Ch 1 and 6.2.2 in Ch 6.

²⁰¹⁷ See the discussion regarding means testing in 6.2.2.3 above.

²⁰¹⁸ See the discussion in 4.3.1 in Ch 4.

considered such as the ones used in Germany where employees are allowed to continue working for the employer during the dispute resolution process in order to preserve employment.²⁰¹⁹

G. Guidelines should be provided regarding the definition of fixed term contract

'Fixed term contract' is defined for the first time. The statutory definition includes the possibility of termination of a fixed term contract on a specific date, upon the happening of an event or completion of a project. It is not clear whether or not the inclusion of a clause enabling either party to terminate the contract by notice would make the contract something other than a fixed term contract. It is proposed that guidelines should be provided in order to clarify the application of the definition.²⁰²⁰

H. The equal pay provisions as contained in the PEPUDA and the Code of Good Practice should be incorporated into legislation where they serve a purpose

Currently the only legislative provisions regarding equal pay are expressed in the PEPUDA which does not apply in instances covered by the EEA and so excludes almost all labour disputes. The soft law mechanism in the Code of Good Practice also serves little purpose since this Code is not incorporated into the LRA in any way. It is suggested that these principles be revived in order to provide guidance regarding the application of the new equal treatment provisions that are proposed.²⁰²¹

²⁰¹⁹ See the discussion of various options that can be considered in combination or separately in 6.2.2.1 and 6.2.2.2.

²⁰²⁰ See 6.2.2.3 above.

²⁰²¹ See the discussion under 1.3 in Ch 1.

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8

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